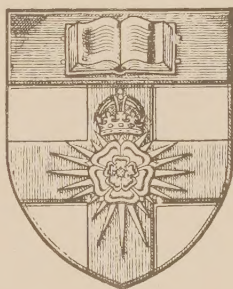


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1910.

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MEMORANDUM.

On Friday, May 6, 1910, our late Sovereign KING EDWARD THE SEVENTH died at Buckingham Palace in the sixty-ninth year of his age and the tenth of his reign. HIS ROYAL HIGHNESS GEORGE PRINCE OF WALES was thereupon proclaimed King by the title of GEORGE THE FIFTH. The Judges of the Supreme Court of Judicature and High Court of Justice subsequently took the oath of allegiance and the judicial oath as Judges of KING GEORGE THE FIFTH.

JUDGES AND LAW OFFICERS.

MEMORANDA.

1910.

March 9. THE RIGHT HONOURABLE SIR JOHN CHARLES BIGHAM *resigned the office of President of the Probate, Divorce, and Admiralty Division. He was afterwards created a Baron of the United Kingdom by the name and title of BARON MERSEY OF TOXTETH in the County Palatine of Lancaster.*

SIR SAMUEL THOMAS EVANS, *His Majesty's Solicitor-General, was appointed President of the Probate, Divorce, and Admiralty Division, and was afterwards sworn of the Privy Council.*

RUFUS DANIEL ISAACS, *King's Counsel, was appointed Solicitor-General, and was afterwards knighted.*

In the Vacation after the Hilary Sittings, THE HONOURABLE MR. JUSTICE SUTTON, one of the Justices of the High Court of Justice, resigned his office on account of ill health.

April 18. THOMAS EDWARD SCRUTTON, *King's Counsel, was appointed one of the Justices of the High Court of Justice, and was afterwards knighted.*

July 26. *By the Supreme Court of Judicature Act, 1910, provision was made for the appointment of two additional Judges of the High Court.*

In the Vacation after the Trinity Sittings, THE HONOURABLE MR. JUSTICE WALTON died suddenly at his residence, Shinglestreet, near Woodbridge, Suffolk, at the age of 65.

THE RIGHT HONOURABLE LORD COLLINS, *Lord of Appeal in Ordinary, and THE HONOURABLE MR. JUSTICE JELF, one of the Justices of the High Court of Justice, resigned their offices respectively on account of ill health.*

1910.

October 12. *By several Letters Patent under the Great Seal the office of one of the Justices of the High Court of Justice was granted respectively unto JOHN ELDON BANKES, King's Counsel, dated September 25, 1910; HORACE EDMUND AVORY, King's Counsel, dated October 1, 1910; THOMAS GARDNER HORRIDGE, King's Counsel, dated October 2, 1910; and CHARLES MONTAGUE LUSH, King's Counsel, dated October 6, 1910. They were afterwards knighted.*

THE RIGHT HONOURABLE SIR WILLIAM SNOWDON ROBSON *was appointed a Lord of Appeal in Ordinary, under the provisions of the Appellate Jurisdiction Act, 1876, and was created a Baron for life by the style and title of BARON ROBSON OF JESMOND in the county of Northumberland. He was afterwards sworn of the Privy Council, of which he had been appointed a member on July 19, 1910, and took his place at the Board accordingly.*

SIR RUFUS DANIEL ISAACS, *Solicitor-General, was appointed Attorney-General. JOHN ALLSEBROOK SIMON, King's Counsel, was appointed Solicitor-General, and was afterwards knighted.*

ERRATA.

<i>Page.</i>	<i>Line.</i>	<i>For</i>	<i>Read</i>
210	last line	<i>Maclean, K.C.</i>	<i>McLean, K.C.</i>
241	3	<i>Reg v. Clarke</i>	<i>Queen v. Clarke.</i>

[1909] A C

345. *Att.-Gen. for New South Wales v. Collector of Customs for New South Wales.*

line 4 of headnote, for "although" read "because."

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Shaw, or, First Series Court of Session Cases	.	.	by	S.
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Morison's Dictionary, or, the Collection of Old Cases	.	.	„	Mor. Dict.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.	PAGE		PAGE
Airdrie Magistrates v. Lanark County Council - H. L. (Sc.)	286	Attorney-General v. Till H. L. (E.)	50
Amalgamated Society of Railway Servants v. Osborne H. L. (E.)	87	Winans v. (No. 2) - - H. L. (E.)	27
Anglo-American Telegraph Com- pany, Reid - Newfoundland Company v. - - P. C.	560	Attorney-General for Ontario, Attorney-General for Quebec v. - - - - P. C.	627
Asiatic Petroleum Company, China Navigation Company v. P. C.	204	Attorney-General for Quebec v. Attorney-General for Ontario P. C.	627

B.		PAGE	
Balmain New Ferry Company, Robinson <i>v.</i> - - P. C.	295	Coatbridge Magistrates <i>v.</i> Lanark County Council - H. L. (Sc.)	286
Barton <i>v.</i> Lempriere - P. C.	330	Coldrick <i>v.</i> Partridge, Jones & Co., Ltd. - - H. L. (E.)	77
Bellerby <i>v.</i> Heyworth - H. L. (E.)	377	Collier (Screw) Company <i>v.</i> Webster - - - H. L. (Sc.)	165
Blockhouse (Gowrie and) Collieries, Ltd., Burchell <i>v.</i> - P. C.	614	Collieries (Gowrie and Blockhouse), Ltd., Burchell <i>v.</i> - P. C.	614
Britannic Merthyr Coal Company <i>v.</i> David - - H. L. (E.)	74	Colliery (New Hucknall) Company, Butterley Company <i>v.</i> - H. L. (E.)	381
Brown <i>v.</i> Dean - H. L. (E.)	373	Cumberland Railway and Coal Company, St. John Pilot Commissioners <i>v.</i> - - P. C.	208
Budhill Coal and Sandstone Company, North British Railway Company <i>v.</i> - H. L. (Sc.)	116	D.	
Burchell <i>v.</i> Gowrie and Blockhouse Collieries, Ltd. - P. C.	614	David, Britannic Merthyr Coal Company <i>v.</i> - H. L. (E.)	74
Bury, Famatina Development Corporation <i>v.</i> - H. L. (E.)	439	Dean, Brown <i>v.</i> - H. L. (E.)	373
Butterley Company <i>v.</i> New Hucknall Colliery Company H. L. (E.)	381	Development (Famatina) Corporation <i>v.</i> Bury - H. L. (E.)	439
C.		Draupner (Owners of SS.) <i>v.</i> Draupner (Owners of Cargo of SS.) - - H. L. (E.)	450
Canada (Dominion of) <i>v.</i> Ontario (Province of) - - P. C.	637	Duguid, Kent Coal Concessions, Ltd. <i>v.</i> - - H. L. (E.)	452
Carmichael <i>v.</i> Greenock Harbour Trustees - - H. L. (Sc.)	274	Dundee Magistrates, Mackison <i>v.</i> - H. L. (Sc.)	285
Carpalla United China Clay Company, Great Western Railway Company <i>v.</i> - H. L. (E.)	83	E.	
Catt <i>v.</i> Wood - H. L. (E.)	404	E. Hulton & Co. <i>v.</i> Jones - H. L. (E.)	20
"Chartreuse." See Lecouturier <i>v.</i> Rey - - H. L. (E.)	262	Edinburgh Life Assurance Company <i>v.</i> Lord Advocate - H. L. (Sc.)	143
China Clay (Carpalla United) Company, Great Western Railway Company <i>v.</i> - H. L. (E.)	83	Egyptian (Owners of SS.), Grant <i>v.</i> - - H. L. (E.)	400
China Navigation Company <i>v.</i> Asiatic Petroleum Company P. C.	204	Equity Fire Insurance Company, Thompson <i>v.</i> - - P. C.	592
Chislett, Macbeth & Co. <i>v.</i> - H. L. (E.)	220	Evans, Vickers, Sons & Maxim, Ltd. <i>v.</i> - - H. L. (E.)	444
Clover, Clayton & Co., Ltd. <i>v.</i> Hughes - - H. L. (E.)	242	F.	
Coal (Britannic) Company <i>v.</i> David - - H. L. (E.)	74	Famatina Development Corporation <i>v.</i> Bury - H. L. (E.)	439
Coal (Cumberland Railway and) Company, St. John Pilot Commissioners <i>v.</i> - - P. C.	208	Ferry (Balmain New) Company, Robinson <i>v.</i> - - P. C.	295
Coal (Kent) Concessions, Ltd. <i>v.</i> Duguid - - H. L. (E.)	452	Fire Insurance (Equity) Company, Thompson <i>v.</i> - P. C.	592
Coal and Sandstone (Budhill) Company, North British Railway Company <i>v.</i> - H. L. (Sc.)	116		

G.		PAGE			PAGE
Gadd, Kirkwood <i>v.</i>	H. L. (E.)	422	Hulton (E.) & Co. <i>v.</i> Jones		
Galbraith <i>v.</i> Grimshaw				H. L. (E.)	20
	H. L. (E.)	508	I.		
Gas (Hamilton) Company <i>v.</i>			Insurance (Equity Fire) Com-		
Hamilton Corporation -	P. C.	300	pany, Thompson <i>v.</i> -	P. C.	592
Gill <i>v.</i> Westlake -	- P. C.	197	Iron Ore Company, Glasgow		
Glasgow Navigation Company <i>v.</i>			Navigation Company <i>v.</i>		
Iron Ore Company				H. L. (Sc.)	293
	H. L. (Sc.)	293	J.		
Goold & Co., Thompson <i>v.</i>			Jones <i>v.</i> Great Central Railway		
	H. L. (E.)	409	Company -	- H. L. (E.)	4
Gordon-Cumming <i>v.</i> Houlds-			——, Hulton (E.) & Co. <i>v.</i>		
worth -	- H. L. (Sc.)	537		H. L. (E.)	20
Gowrie and Blockhouse Collieries,			—— <i>v.</i> North Vancouver Land		
Ld., Burchell <i>v.</i> -	- P. C.	614	and Improvement Company		
Grant <i>v.</i> Egyptian (Owners				P. C.	317
of SS.) -	- H. L. (E.)	400	K.		
Great Central Railway Company,			Kelly <i>v.</i> Hart -	- P. C.	192
Jones <i>v.</i> -	- H. L. (E.)	4	Kent Coal Concessions, Ld. <i>v.</i>		
Great Western Railway Com-			Duguid -	- H. L. (E.)	452
pany <i>v.</i> Carpalla United China			Kinloch, Young <i>v.</i> -	H. L. (Sc.)	169
Clay Company -	H. L. (E.)	83	Kirkwood <i>v.</i> Gadd -	H. L. (E.)	422
Greenock Harbour Trustees, Car-			L.		
michael <i>v.</i> -	- H. L. (Sc.)	274	Lanark County Council, Airdrie		
Greville <i>v.</i> Parker -	- P. C.	335	Magistrates <i>v.</i> -	H. L. (Sc.)	286
Grimshaw, Galbraith <i>v.</i>				Coat-	
	H. L. (E.)	508	bridge Magistrates <i>v.</i>		
H.				H. L. (Sc.)	286
Hamilton Corporation, Hamilton			Land and Improvement (North		
Gas Company <i>v.</i> -	- P. C.	300	Vancouver) Company, Jones		
Hamilton Gas Company <i>v.</i>			<i>v.</i> -	- P. C.	317
Hamilton Corporation -	P. C.	300	Lauderdale (Earl), Scrymgeour		
Hart, Kelly <i>v.</i> -	- P. C.	192	Wedderburn <i>v.</i> -	H. L. (Sc.)	342
Havana, The. Richelieu and			Laughton <i>v.</i> Port Erin Commis-		
Ontario Navigation Company			sioners -	- P. C.	565
<i>v.</i> Taylor -	- P. C.	170	Lecouturier <i>v.</i> Rey -	H. L. (E.)	262
Heat, Light, and Power (Mont-			Lempriere, Barton <i>v.</i> -	P. C.	330
real) Company <i>v.</i> Sedgwick			Life Assurance (Edinburgh)		
	P. C.	598	Company <i>v.</i> Lord Advocate		
Heyworth, Bellerby <i>v.</i>				H. L. (Sc.)	143
	H. L. (E.)	377	Light, Heat, and Power (Montreal)		
Hodgson <i>v.</i> West Stanley Col-			Company <i>v.</i> Sedgwick	P. C.	598
liery (Owners of) -	H. L. (E.)	229	Lilley <i>v.</i> London County Council		
Hordern <i>v.</i> Hordern -	P. C.	465		H. L. (E.)	1
Houldsworth, Gordon-Cumming					
<i>v.</i> -	- H. L. (Sc.)	537			
Hughes, Clover, Clayton & Co.,					
Ld. <i>v.</i> -	- H. L. (E.)	242			

	PAGE		PAGE
Li Yau Sam, Russo-Chinese Bank <i>v.</i> - - - - P. C.	174	North Manchester Overseers, Winstanley <i>v.</i> - H. L. (E.)	7
Llangattock (Lord) <i>v.</i> Watney, Combe, Reid & Co.		North Vancouver Land and Improvement Company, Jones <i>v.</i> - - - - P. C.	317
	H. L. (E.) 394		
London County Council, Lilley <i>v.</i> - - - - H. L. (E.)	1		O.
Lord Advocate, Edinburgh Life Assurance Company <i>v.</i>			
	H. L. (Sc.) 143	O'Keefe, Williams <i>v.</i> - P. C.	186
Lumber and Manufacturing (Victoria) Company, White <i>v.</i>		Ontario (Province of), Canada (Dominion of) <i>v.</i> - - P. C.	637
	P. C. 606	Ore (Iron) Company, Glasgow Navigation Company <i>v.</i>	
			H. L. (Sc.) 293
M.		Osborne, Amalgamated Society of Railway Servants <i>v.</i>	
Macbeth & Co. <i>v.</i> Chislett			H. L. (E.) 87
	H. L. (E.) 220		
Macharg, Williams <i>v.</i> - P. C.	476		P.
Mackison <i>v.</i> Dundee Magistrates			
	H. L. (Sc.) 285	Parker, Greville <i>v.</i> - - P. C.	335
Manchester Liners, Ltd., Moore <i>v.</i> - - - - H. L. (E.)	498	Partridge, Jones & Co., Ltd., Coldrick <i>v.</i> - H. L. (E.)	77
Manufacturing and Lumber (Victoria) Company, White <i>v.</i>		Petroleum (Asiatic) Company, China Navigation Company <i>v.</i>	
	P. C. 606		P. C. 204
Marshall <i>v.</i> Wild Rose (Owners of SS.) - - H. L. (E.)	486	Port Erin Commissioners, Laughton <i>v.</i> - - P. C.	565
Montreal Light, Heat, and Power Company <i>v.</i> Sedgwick		Power, Light, and Heat (Mont- real) Company <i>v.</i> Sedgwick	
	P. C. 598		P. C. 598
Moore <i>v.</i> Manchester Liners, Ltd.			
	H. L. (E.) 498		R.
N.			
Natal Bank <i>v.</i> Rood - P. C.	570	Railway and Coal (Cumberland) Company, St. John Pilot Com- missioners <i>v.</i> - - P. C.	208
Navigation (China) Company <i>v.</i> Asiatic Petroleum Company		Railway Servants (Amalgamated Society of) <i>v.</i> Osborne	
	P. C. 204		H. L. (E.) 87
Navigation (Glasgow) Company <i>v.</i> Iron Ore Company		Reid-Newfoundland Company <i>v.</i> Anglo-American Telegraph Company - - - P. C.	560
	H. L. (Sc.) 293	Rey <i>v.</i> Lecouturier - H. L. (E.)	262
Navigation (Richelieu and Ontario) Company <i>v.</i> Taylor		Richelieu and Ontario Naviga- tion Company <i>v.</i> Taylor	P. C. 170
	P. C. 170	Robinson <i>v.</i> Balmain New Ferry Company - - - P. C.	295
New Hucknall Colliery Company, Butterley Company <i>v.</i>		Rood, Natal Bank <i>v.</i> - P. C.	570
	H. L. (E.) 381	Russo-Chinese Bank <i>v.</i> Li Yau Sam - - - - P. C.	174
North British Railway Company <i>v.</i> Budhill Coal and Sandstone Company - - - H. L. (Sc.)	116		

S.	PAGE	Victoria Lumber and Manufacturing Company, White v.	PAGE
Sadler, Whiteman v. H. L. (E.)	514		606
St. George, Hanover Square (Rector and Churchwardens) v. Westminster Corporation			
H. L. (E.)	225	W.	
St. John Pilot Commissioners v. Cumberland Railway and Coal Company - - - P. C.	208	Watney, Combe, Reid & Co., Llangattock (Lord) v.	
Screw Collier Company v. Webster		H. L. (E.)	394
H. L. (Sc.)	165	Webster, Screw Collier Company v. - - - H. L. (Sc.)	165
Scrymgeour Wedderburn v. Lauderdale (Earl) H. L. (Sc.)	342	Wedderburn (Scrymgeour) v. Lauderdale (Earl)	
Sedgwick, Montreal Light, Heat, and Power Company v. P. C.	598	H. L. (Sc.)	342
Stewart v. Williamson		West Stanley Colliery (Owners of), Hodgson v. - H. L. (E.)	229
H. L. (Sc.)	455	Westlake, Gill v. - - P. C.	197
T.		Westminster Corporation, St. George, Hanover Square (Rec- tor and Churchwardens) v.	
Taylor, Richelieu and Ontario Navigation Company v. P. C.	170	H. L. (E.)	225
Telegraph (Anglo-American) Company, Reid-Newfoundland Company v. - - P. C.	560	White v. Victoria Lumber and Manufacturing Company	
Thompson v. Equity Fire Insur- ance Company - - P. C.	592	P. C.	606
----- v. Gould & Co.		Whiteman v. Sadler - H. L. (E.)	514
H. L. (E.)	409	Wild Rose (Owners of SS.), Marshall v. - H. L. (E.)	486
Tientsin, The. China Navi- gation Company v. Asiatic Petroleum Company - P. C.	204	Williams v. Macharg - P. C.	476
Till, Attorney-General v.		----- v. O'Keefe - P. C.	186
H. L. (E.)	50	Williamson, Stewart v.	
Toronto Corporation v. Toronto Railway Company - P. C.	312	H. L. (Sc.)	455
Toronto Railway Company, Toronto Corporation v. P. C.	312	Winans v. Attorney-General (No. 2) - - H. L. (E.)	27
		Winstanley v. North Manchester Overseers - - H. L. (E.)	7
		Wood, Catt v. - H. L. (E.)	404
V.		Y.	
Vickers, Sons & Maxim, Ltd. v. Evans - - H. L. (E.)	444	Young v. Kinloch - H. L. (Sc.)	169

TABLE OF CASES CITED.

A.

	PAGE
Aaron's Reefs, <i>Ld. v. Twiss</i>	[1896] A. C. 273 320
Alcock <i>v. Cooke</i>	5 Bing. 340 357
Allan <i>v. Liverpool Overseers</i>	43 L. J. (M.C.) 69 10
Aines <i>v. Birkenhead Docks Trustees</i>	20 Beav. 332 280
Anderson <i>v. Bank of British Columbia</i>	2 Ch. D. 644 4
Andrew <i>v. Failsworth Society</i>	[1904] 2 K. B. 32 486
Andrews <i>v. Mitchell</i>	[1905] A. C. 78 405
Aracan, <i>The</i>	L. R. 6 P. C. 127 211
Arnold <i>v. Arnold</i>	2 My. & Cr. 256 39
Ashbury Railway Carriage and Iron Company <i>v. Riche</i>	L. R. 7 H. L. 653 90
Atmore <i>v. Chaddock</i>	13 S. C. R. 205 580
Attorney-General <i>v. Alexander</i>	L. R. 10 Ex. 20 50
----- <i>v. Blucher de Wahlstatt</i> (Countess)	3 H. & C. 390 164
----- <i>v. Bouwens</i>	4 M. & W. 171 28
----- <i>v. Campbell</i>	L. R. 5 H. L. 524 28
----- <i>v. Glendining</i>	92 L. T. 87 29
----- <i>v. Great Eastern Railway Company</i>	5 App. Cas. 473 90, 194
----- <i>v. Jewish Colonization Association</i>	[1901] 1 K. B. 123 28
----- <i>v. Manchester Corporation</i>	[1906] 1 Ch. 643 90
----- <i>v. Mercer</i>	8 App. Cas. 767 595
----- <i>v. Mersey Railway Company</i>	[1907] A. C. 415 90
----- <i>v. Napier</i>	6 Ex. 217 28
----- <i>v. Till</i>	[1910] A. C. 50 164
Attorney-General for Dominion <i>v. Attorney-General for Ontario</i>	[1897] A. C. 199 643
Attorney-General for Ontario <i>v. Attorney-General for Quebec</i>	[1903] A. C. 39 628
Attree <i>v. Hawe</i>	9 Ch. D. 337 280

B.

Baines <i>v. Ewing</i>	L. R. 1 Ex. 320 177
Baker <i>v. White</i>	L. R. 20 Eq. 166 579
Bannatyne <i>v. MacIver</i>	[1906] 1 K. B. 163 177
Barnes <i>v. Brown</i>	[1909] 1 K. B. 38 377
Bartonshill Coal Company <i>v. McGuire</i>	3 Macq. 300 78
Barwick <i>v. English Joint Stock Bank</i>	L. R. 2 Ex. 259 178
Bastin <i>v. Bidwell</i>	18 Ch. D. 238 338
Beckwith <i>v. Harding</i>	1 B. & Al. 508 9

	PAGE
Bennett <i>v.</i> Wordie	1 F. 855 409
Bensley <i>v.</i> Bignold	5 B. & Al. 335 516
Benson <i>v.</i> Chapman	6 Man. & G. 792 602
Beswick <i>v.</i> Alker	L. R. 8 C. P. 265 8
Bevan <i>v.</i> Crawshay	85 L. T. 496 238
Biggs <i>v.</i> Mitchell	2 B. & S. 523 594
Birch <i>v.</i> Birch	[1902] P. 130 374
Bird <i>v.</i> Jones	7 Q. B. 742 298
Birmingham Vinegar Brewing Com- pany <i>v.</i> Powell	[1897] A. C. 710 269
Blackmore, Ex parte	1 B. & Ad. 122 9
Blackwood <i>v.</i> Reg.	8 App. Cas. 82. 35
Blaker <i>v.</i> Herts and Essex Water- works Company	41 Ch. D. 399 280
Boardman <i>v.</i> Scott	[1902] 1 K. B. 43 243
Bonnard <i>v.</i> Dott	[1906] 1 Ch. 740 515
Bos <i>v.</i> Helsham	L. R. 2 Ex. 72 459
Boston <i>v.</i> Pigott	L. R. 10 Q. B. 86 566
Bound <i>v.</i> Lawrence	[1892] 1 Q. B. 226 222
Bourke <i>v.</i> Warren	2 C. & P. 307 21
Bower <i>v.</i> Earl Mareschal	{ 2 Brown's Supp. 18; 3 Brown's Supp. 420 358
Boyce <i>v.</i> Grand Rapids Fire Insurance Company	{ 124 Mich. 455 595
Bremer <i>v.</i> Freeman	10 Moo. P. C. 306 28
Bright <i>v.</i> Boyd	1 Story's Rep. 479 641
Brink <i>v.</i> Voigt	1 Menzies, 537; 2 Menzies, 394 578
Brintons <i>v.</i> Turvey	[1905] A. C. 230 242
British Mutual Banking Company <i>v.</i> Charnwood Forest Railway Com- pany	{ 18 Q. B. D. 714 178
Broad <i>v.</i> Edinburgh Northern Tram- ways Company	{ 15 R. 641 279
Bruce, In re	2 C. & J. 436 28
Bruce and Bath River Navigation Company <i>v.</i> Willis	{ 11 Ad. & E. 463 10
Bryan <i>v.</i> Whistler	8 B. & C. 288 8
Bryant <i>v.</i> La Banque du Peuple	[1893] A. C. 170 177
Buchanan <i>v.</i> Andrew	L. R. 2 H. L. Sc. 286 137
Bustros <i>v.</i> White	1 Q. B. D. 423. 5
Bute (Lord) <i>v.</i> Grindall	1 T. R. 338 10
Butler <i>v.</i> Manchester, Sheffield, and Lincolnshire Railway Company	{ 21 Q. B. D. 207 298
Butterfield <i>v.</i> Forrester	11 East, 60 608
Butterknowle Case	[1906] A. C. 305 381
Byrne <i>v.</i> Rogers	[1910] 2 I. R. 220 378

C.

Cairney <i>v.</i> Back	[1906] 2 K. B. 746 509
Calder <i>v.</i> Mackay	22 D. 741 458
Carus-Wilson and Greene, In re	18 Q. B. D. 7 459
Cato <i>v.</i> Thompson	9 Q. B. D. 616 332
Chapleo <i>v.</i> Brunswick Building Society	6 Q. B. D. 696 177
Charles <i>v.</i> Taylor	3 C. P. D. 492. 79
Chippendall <i>v.</i> William Laidley & Co.	[1909] A. C. 199 332
Clifford <i>v.</i> Wicks	1 B. & Al. 498. 10
Cloete's Case	5 S. C. C. 59 576

	PAGE
Cockburn of Langton's Case	{ Mor. Dict. 150; Elchies, 384; 1 Pat. App. 603 342, 358
Cockerell v. Cholmeley	1 Russ. & My. 418 320
Coe v. Fife Coal Company	(1909) S. C. 394 243
Coghlan v. Cumberland	[1898] 1 Ch. 704 339
Collins v. Collins	{ 26 Beav. 306; 28 L. J. (Ch.) 184 459
Combined Weighing and Advertising Machine Company, In re	43 Ch. D. 99 509
Commissioners of Stamps v. Hope	[1891] A. C. 476 28
Cooper v. Hawkins	[1904] 2 K. B. 164 194
— v. Phibbs	L. R. 2 H. L. 149 320
Cope v. Rowlands	2 M. & W. 149 516
Corbett v. Pearce	[1904] 2 K. B. 422 221
Cotton v. Beattie	17 R. 262 279
Cowley (Earl) v. Inland Revenue Commissioners	{ [1899] A. C. 198 29
Crown Bank, In re	44 Ch. D. 634 90
Cullen v. Butler	5 M. & S. 461 132
Cunningham v. McGregor	3 F. 775 230

D.

Dann v. Simmins	41 L. T. 783 177
Davidson v. Logan	(1908) S. C. 350 459
Davies v. Rhymney Iron Company	16 Times L. R. 329 82
Davis v. Thomas	1 Russ. & My. 506 337
Dawdy, In re	15 Q. B. D. 426 459
De Begnis v. Armistead	10 Bing. 107 516
Denysen v. Mostert	L. R. 4 P. C. 236 570
De Romana v. Roberts	[1906] P. 332 9
Derry v. Peek	14 App. Cas. 337 22
De Smidt v. Burton	1 Menzies, 222; 2 Menzies, 401 579
Dinham v. Bradford	L. R. 5 Ch. 519 465
Dixon v. Caledonian and Glasgow and South Western Railway Company	{ 5 App. Cas. 820 123
— v. White	8 App. Cas. 833 386
Dobson v. Sotheby	Moo. & M. 90 594
Dudley Electric Traction Co. v. Dudley Corporation	{ 96 L. T. 340; 97 L. T. 556 303

E.

East London Waterworks Company v. Mile End Old Town Trustees	17 Q. B. 512 10
Eastern Counties Railway Company v. Hawkes	5 H. L. C. 331 90
Eastern Telegraph Company v. Dent	[1899] 1 Q. B. 839 340
Edinburgh Street Tramways Company v. Edinburgh (Lord Provost)	[1894] A. C. 456 303
Egerton v. Brownlow	4 H. L. C. 161 90
Elmore v. Hunter	3 C. P. D. 116 211
Ely (Bishop) v. Gibbons	4 Hagg. Ecc. 156 10
Erasmus v. Erasmus' Guardians and Executors	Transvaal L. R. 843 580
Erichsen v. Last	8 Q. B. D. 414 433
Ewin, In re	1 C. & J. 151 28
Exeter's (Dean of) Case	1 Salk. 334 9

F.

		PAGE
Falkner <i>v.</i> Ritchie	2 M. & S. 290	602
Farquharson <i>v.</i> King	[1902] A. C. 325	176
Farry <i>v.</i> Great Northern Railway Company	[1898] 2 I. R. 352	298
Federated Amalgamated Government Railway and Tramway Service Association <i>v.</i> New South Wales Railway Traffic Employees' Association	4 Comm. L. R. 488	194
Fennell <i>v.</i> Ridler	5 B. & C. 406	516
Fenton <i>v.</i> Thorley	[1903] A. C. 443	242
Fergusson <i>v.</i> Norman	5 Bing. N. C. 76	516
Finch <i>v.</i> Underwood	2 Ch. D. 310	338
Fitzgerald <i>v.</i> W. G. Clarke & Son	[1908] 2 K. B. 796	486
Forth Bridge Railway Company <i>v.</i> Dunfermline (The Guildry of)	(1909) S. C. 493	121

G.

Garden Gully United Quartz Mining Company <i>v.</i> McLister	1 App. Cas. 39	320
Gardiner <i>v.</i> Stewart's Trustees	(1908) S. C. 985	460
Gardner <i>v.</i> London, Chatham, and Dover Railway Company	L. R. 2 Ch. 201	279
----- <i>v.</i> Salvador	1 Moo. & R. 116	602
Geisse <i>v.</i> Taylor	[1905] 2 K. B. 658	509
Gibson <i>v.</i> Evans	23 Q. B. D. 384	23
Gilbert <i>v.</i> Buzzard	3 Phillim. 335	9
Giles <i>v.</i> Melsom	L. R. 6 H. L. 24	594
Gillespie <i>v.</i> Riddell	[1909] A. C. 130	459
Gilmour <i>v.</i> Caledonian Insurance Company	[1893] A. C. 85	457
Glasgow (Lord Provost and Magistrates of) <i>v.</i> Farie	13 App. Cas. 657 ; 14 R. 357..84, 121	
Glasgow and South Western Railway Company <i>v.</i> Bain	21 R. 134	121
Glen <i>v.</i> Lewis	8 Ex. 607	594
Goetze <i>v.</i> Aders	2 R. 150	510
Goodwin <i>v.</i> Robarts	1 App. Cas. 476	28
Goss <i>v.</i> Withers	2 Burr. 687	601
Grainger <i>v.</i> Gough	[1896] A. C. 325	433
Grandee, The	8 Can. Ex. Rep. 54	210
Grant <i>v.</i> Norway	10 C. B. 665	177
Great Western Railway Company <i>v.</i> Bennett	L. R. 2 H. L. 27	123
Blades	[1901] 2 Ch. 624	84, 121
Carpalla United China Clay Company	[1909] 1 Ch. 218	123
Rushout	5 De G. & Sm. 290	90
Green <i>v.</i> Bartlett	14 C. B. (N.S.) 681	624
Greenslade <i>v.</i> Darby	L. R. 3 Q. B. 421	9
Greig <i>v.</i> Edinburgh University	L. R. 1 H. L. Sc. 348	11
Gresham Life Assurance Society <i>v.</i> Styles	[1892] A. C. 309	147
Groves <i>v.</i> Wimborne (Lord)	[1898] 2 Q. B. 402	74

H.

		PAGE
Haldane <i>v.</i> Girvan and Portpatrick } Junction Railway Company }	8 R. 669	278
Hales <i>v.</i> Miller	5 S. R. N. S. W. 163	480
Hambro <i>v.</i> Burnand	[1904] 2 K. B. 10	177
Hamilton <i>v.</i> Baker	14 App. Cas. 209	18
----- (Duke) <i>v.</i> Bentley	3 D. 1121	121
----- <i>v.</i> Mendes	2 Burr. 1209	601
Hammersmith Railway Company <i>v.</i> } Brand }	L. R. 4 H. L. 171	90
Harrison <i>v.</i> Smith	20 L. T. 713	22
Harvey <i>v.</i> Mayne	6 I. R. C. L. 417	298
Hazard <i>v.</i> Treadwell	1 Str. 506	178
Heath <i>v.</i> Haynes	27 L. J. (C.P.) 50	10
Hensey <i>v.</i> White	[1900] 1 Q. B. 481	255
Heriot's Hospital <i>v.</i> Gibson	2 Dow, 301	539
Hewitt <i>v.</i> Duchess (Owners of Ship)	[1910] 1 K. B. 772	499
Hext <i>v.</i> Gill	L. R. 7 Ch. 699	83, 121
Higgins <i>v.</i> King's Proctor	[1910] P. 151	374
Hill <i>v.</i> East and West India Dock	9 App. Cas. 457	579
Hole <i>v.</i> Sittingbourne and Sheerness } Railway Company }	6 H. & N. 488	74
Holmes <i>v.</i> Tutton	5 E. & B. 65	509
Holywell Union Assessment Com- } mittee <i>v.</i> Halkyn District Mines }	[1895] A. C. 117	10
Drainage Company		
Home Insurance Company of New } York <i>v.</i> Victoria Montreal Fire }	[1907] A. C. 59	601
Insurance Company		
Hopetoun (Earl) <i>v.</i> North British } Railway Company }	20 R. 704	123
----- <i>v.</i> Scots Mines } Company }	18 D. 739	461
Hopper, In re	L. R. 2 Q. B. 367	459
Hornsey Urban Council <i>v.</i> Hennell	[1902] 2 K. B. 78	195
Howells <i>v.</i> Landore Steel Company	L. R. 10 Q. B. 62	74
----- <i>v.</i> Vivian	85 L. T. 529	238
Hutchinson <i>v.</i> York, Newcastle, and } Berwick Railway Company }	5 Ex. 343; 19 L. J. (Ex.) 296	78

I.

Inchbald <i>v.</i> Western Neilgherry Coffee } Company }	17 C. B. (N.S.) 733	626
Indian Claims, In re	25 Can. S. C. R. 434	643
Inglis <i>v.</i> Buttery & Co.	3 App. Cas. 552	540
----- <i>v.</i> Mansfield	3 Cl. & F. 362	547
Irving <i>v.</i> Manning	6 C. B. 391	602
Ismay <i>v.</i> Williamson	[1908] A. C. 437	242

J.

Jamieson <i>v.</i> North British Railway } Company }	6 S. L. R. 188	121
Jane and Matilda, The	1 Hagg. Adm. 187	222

		PAGE
Johnson <i>v.</i> Aylmer	Cro. Jac. 126	21
——— <i>v.</i> Lindsay	[1891] A. C. 371	78
——— <i>v.</i> Lyttle's Iron Agency	5 Ch. D. 687	319
——— <i>v.</i> McIntosh	8 Wheaton (21 U.S.), 543	643
Jollet <i>v.</i> Deponthieu	1 H. Bl. 132, n.	509
Jones <i>v.</i> Mersey Docks and Harbour Board	11 H. L. C. 443	17
——— <i>v.</i> Monte Video Gas Company	5 Q. B. D. 556.	453
Josephson <i>v.</i> Young	21 N. S. W. L. R. 188	480

K.

Keen <i>v.</i> Thomas	[1905] 1 K. B. 136	595
Keith <i>v.</i> Smyth	12 R. 66	558
Kerrison <i>v.</i> Cole	8 East, 231	517
Kilpatrick <i>v.</i> Wemyss Coal Company	{ (1907) S. C. 320; 44 Sc. L. R. 255	410, 417
Kirkpatrick's Trustees <i>v.</i> Kirkpatrick	1 R. 37	591

L.

Laing <i>v.</i> Reed	L. R. 5 Ch. 4	90
Lambeth Overseers <i>v.</i> London County Council	{ [1897] A. C. 625	9
Langwill <i>v.</i> Leahy	4 N. S. W. State Rep. 717	194
Larsen <i>v.</i> Sylvester	[1908] A. C. 295	595
Last <i>v.</i> London Assurance Company	{ 12 Q. B. D. 389; 14 Q. B. D. 239; 10 App. Cas. 438	148
Latimer <i>v.</i> Western Morning News	25 L. T. 44	22
Le Fanu <i>v.</i> Malcolmson	1 H. L. C. 637	21
Le Lievre <i>v.</i> Gould	[1893] 1 Q. B. 491	22
Linaker <i>v.</i> Pilcher	70 L. J. (K.B.) 396	89
Lincoln Corporation <i>v.</i> Holmes Common	{ L. R. 2 Q. B. 482	17
Lindsay Petroleum Company <i>v.</i> Hurd	L. R. 5 P. C. 221	320
Linklater <i>v.</i> Webster	6 Minton-Senhouse, C. C. 50	410
Lister <i>v.</i> Wood	23 Q. B. D. 229	374
Logan <i>v.</i> Leadbetter	15 R. 115	459
London County Council <i>v.</i> Attorney-General	{ [1901] A. C. 26	148
——— <i>v.</i> ———	{ [1902] A. C. 165	90
——— <i>v.</i> ———	{ [1907] A. C. 131	148
——— <i>v.</i> Metropolitan Railway Company	{ [1909] 1 K. B. 116	2
London Street Tramways Company <i>v.</i> London County Council	{ [1894] 2 Q. B. 189; [1894] A. C. 489	303
Lord Advocate <i>v.</i> A. B.	3 Tax Cases, 617	50
——— <i>v.</i> Sawers	35 Sc. L. R. 190	50
Love <i>v.</i> Bell	9 App. Cas. 286	384
Low <i>v.</i> General Steam Fishing Company	{ [1909] A. C. 523	486, 499
Lowe <i>v.</i> Myers	{ [1906] 2 K. B. 265	409
Lowfield <i>v.</i> Bancroft	2 Str. 934	21

M.

		PAGE
Mac, The	7 P. D. 38, 126	211
Macbeth & Co. v. Maritime Insurance Company	[1908] A. C. 144	600
McCurdy v. Orient Insurance Company	30 Penn. S. C. 77	595
McDonald v. SS. Banana	[1908] 2 K. B. 926	486, 499
Macdonell v. Gordon (Duke)	6 S. 600	360
M'Gough v. Lancaster Burial Board	21 Q. B. D. 323	9
M'Gregor v. Stevenson	9 D. 1056	458
M'Innes v. Dunsmuir and Jackson	(1908) S. C. 1021	242
Mackenzie v. Hill	40 S. Jur. 499	460
McLean v. Moss Bay Co.	[1909] 2 K. B. 521	229
M'Nair's Trustees v. Roxburgh	17 D. 445	461
Magdalen College Case	11 Rep. 66b	194
Maidman v. Malpas	1 Hagg. Cons. 205	10
Main Colliery Company v. Davies	[1900] A. C. 358	230
Mar Peerage	1 App. Cas. 1	362
Marno v. Workman, Clark & Co.	33 I. L. T. 183	410
Marriott v. Tarpley	9 Sim. 279	8
Marshall v. South Staffordshire Tramways Company	[1895] 2 Ch. 36	280
Melliss v. Shirley Local Board	16 Q. B. D. 446	516, 566
Menzies v. Breadalbane (Earl)	19 Fac. Coll. 531; 1 Sh. App. 225	120
Mersey Docks and Harbour Board v. Cameron	11 H. L. C. 443	10
Micklethwait v. Winter	20 L. J. (Ex.) 313	133
Midland Railway Company v. Checkley	L. R. 4 Eq. 19	125
Robinson	15 App. Cas. 19	84, 123
Millar v. Radford	19 Times L. R. 575	624
Mitchell v. City of London Fire Insurance Company	12 Ont. Rep. 706	594
----- v. United States	9 Peters (34 U. S.), 711	643
Montgomerie & Co. v. Wallace James	[1904] A. C. 73	339
Morgan v. Crawshaw	L. R. 5 H. L. 304	17
Morrison v. Aberdeen Market Company	9 D. 910	458
Mosely v. Koffyfontein Mines, Ltd.	[1904] 2 Ch. 108	440
Moss v. Smith	9 C. B. 94	602
Murray v. Scott	9 App. Cas. 519	90
Murtagh v. Barry	24 Q. B. D. 632	373
Myers, In re	[1908] 1 K. B. 941	517

N.

Nash v. Preece	20 N. Z. L. R. (C. A.) 141	341
Natal (Bishop), In're	3 Moo. P. C. (N.S.) 152	356
Neale v. Cottingham	1 H. Bl. 133, n.	509
Nevill v. Bridger	L. R. 9 Ex. 214	9
Nivison v. Howat	11 R. 182	458
North British Railway Company v. Tod	5 Bell's App. 184	539
Northern Assurance Company v. Russell	2 Tax Cas. 577; 16 R. 461	148
Norton v. Yates	[1906] 1 K. B. 112	509

O.

		PAGE
Oakes <i>v.</i> Monkland Iron Company	11 R. 579	222
O'Keefe <i>v.</i> Malone	[1903] A. C. 365	187
——— <i>v.</i> Williams	{ 7 N. S. W. State Rep. 304; 5 Commonwealth Rep. 217	189
Ontario Mining Company <i>v.</i> Seybold	[1903] A. C. 73	643
Oosthuizen <i>v.</i> Moeke	1 Roscoe, 230	571
Oosthuysen <i>v.</i> Oosthuysen	1 Buchanan's Rep. 51	577
Orrell <i>v.</i> Orrell	21 D. 554	460

P.

Palliser <i>v.</i> Dale	[1897] 1 Q. B. 257	405
Palmer <i>v.</i> Johnson	13 Q. B. D. 351	594
Pandorf <i>v.</i> Hamilton	17 Q. B. D. 670	594
Park <i>v.</i> Maver	43 Sc. L. R. 191	409
Parsons <i>v.</i> Scott	2 Taunt. 363	602
Pidgeon <i>v.</i> Burslem	3 Ex. 465	515
Pinto <i>v.</i> Badman	8 Rep. Pat. Cas. 181	270
Pole <i>v.</i> Fitzgerald	Willes, 641	602
Pomfret <i>v.</i> Lancashire and Yorkshire Railway Company	{ [1903] 2 K. B. 718	486
Pomphrey <i>v.</i> Southwark Press	[1901] 1 Q. B. 86	444
Popplewell <i>v.</i> Hodkinson	L. R. 4 Ex. 248	200
Portobello Magistrates <i>v.</i> Edinburgh Magistrates	{ 10 R. 130	290
Poulton <i>v.</i> London and South Western Railway Company	{ L. R. 2 Q. B. 534	298
Powell <i>v.</i> Main Colliery Company	[1900] A. C. 366	409
Prendergast <i>v.</i> Turton	{ 1 Y. & C. Ch. 98; 13 L. J. (Ch.) 268	321, 328
Priestley <i>v.</i> Fowler	3 M. & W. 1	74, 78
Province of Ontario <i>v.</i> Dominion of Canada	{ 25 Can. S. C. R. 434	643
Pryce <i>v.</i> Penrikyber Company	[1902] 1 K. B. 221	230
Pugh <i>v.</i> Golden Valley Railway Com- pany	{ 15 Ch. D. 330	594
——— <i>v.</i> London, Brighton, and South Coast Railway Company	{ [1896] 2 Q. B. 248	249
Putney Overseers <i>v.</i> London and South Western Railway Company	{ [1891] 1 Q. B. 440	10

Q.

Queen <i>v.</i> Clarke	[1906] 2 I. R. 135	241
----------------------------------	------------------------------	-----

R.

Radley <i>v.</i> London and North Western Railway Company	{ 1 App. Cas. 754	609
Railway Time Tables Publishing Com- pany, <i>In re</i>	{ 62 L. J. (Ch.) 935	440
Ramsay <i>v.</i> Strain	11 R. 527	458
Reed <i>v.</i> Great Western Railway Com- pany	{ [1909] A. C. 31	486
Rees <i>v.</i> Penrikyber Company	[1903] 1 K. B. 259	230

		PAGE
Reg. v. Capel	12 Ad. & E. 382	10
— v. Christopherson	16 Q. B. D. 7	8
— v. Ellis	12 L. J. (M.C.) 20	10
— v. Judge of the City of London Court	25 Q. B. D. 339	222
— v. Kent Justices	24 Q. B. D. 181	195
— v. Lynch	[1898] 1 Q. B. 61	222
— v. Twiss	L. R. 4 Q. B. 407	8
Renaud v. Lamothe	32 Can. S. C. R. 357	602
Rex v. Abingdon (Lord)	1 Esp. 226	21
— v. Bell	7 T. R. 598	10
— v. Coleridge	2 B. & Al. 806	9
— v. Horne	Cowp. 672	21
— v. London Corporation	4 T. R. 21	10
— v. Melladew	[1907] 1 K. B. 192	10
— v. Sudbury	1 B. & C. 389	17
Rice v. Swansea Vale Owners	26 Times L. R. 276	486
Rich v. Bushnell	4 Hagg. Ecc. 164	10
Riche v. Ashbury Railway Carriage Company	L. R. 9 Ex. 262	103
Rigby v. Connol	14 Ch. D. 489	102
River Wear Commissioners v. Adamson	2 App. Cas. 743	382
Roberts v. Ahern	1 Comm. L. R. 406	194
Robertson v. Allan Brothers	98 L. T. 831	486
— v. ————	77 L. J. (K.B.) 1072	499
— v. Boyd and Winans	12 E. 419	459
Robinson v. Pett	2 W. & T. (7th ed.) p. 606	578
Robson v. Hyde	Caldecott, 310	8
Rogers v. Whiteley	[1892] A. C. 118	509
Rogerson, Ex parte	9 N. S. W. L. R. 30	194
Rosetto v. Gurney	11 C. B. 176	602
Rosse (Earl) v. Wainman	14 M. & W. 859	133
Roux v. Salvador	3 Bing. N. C. 266	602
Rowbotham v. Wilson	8 H. L. C. 348	387
Royou v. Paul	28 L. J. (Ch.) 555	565
Ruben v. Great Fingall Consolidated	[1906] A. C. 439	177
Ruby (No. 2), The	[1898] P. 59	222

S.

Sailing Ship Blairmore Company v. Macredie	[1898] A. C. 593	601
St. Catherine's Milling and Lumber Company v. Reg.	14 App. Cas. 46	637
St. Giles, Camberwell (Vestry) v. London Cemetery Company	[1894] 1 Q. B. 699	10
Salomon v. Salomon & Co.	[1897] A. C. 22	515
Scott v. Fernie	11 B. C. R. 91	609
Seager v. Bowle	1 Add. 541	10
Selkirk (Earl) v. Nasmyth	Mor. Dict. 627.	461
Senior v. Fountaine	[1907] 2 K. B. 563	229
Shaw v. Benson	11 Q. B. D. 563	516
— v. Robberds	6 Ad. & E. 75	594
Shodroske v. Hadley	27 N. Z. L. R. (S.C.) 377	338
Sill v. Worswick	1 H. Bl. 665	509
Simmons v. White	[1899] 1 Q. B. 1005	230
Small v. Smith	10 App. Cas. 119	194
Smith v. Anderson	15 Ch. D. 247	431
— v. Barnitt	12 N. Z. L. R. 449	339

		PAGE
Smith <i>v.</i> Duff	5 D. 749	458
— <i>v.</i> Sayers (Executors of)	Foord's Rep. 66	579
— <i>v.</i> Weguelin	L. R. 8 Eq. 198	28
Sneddon <i>v.</i> Addie & Sons	6 F. 992	230
Solomons <i>v.</i> Ross	1 H. Bl. 131 n.	509
Southwark and Vauxhall Water Com- pany <i>v.</i> Quick	3 Q. B. D. 315	5
Spackman <i>v.</i> Plumstead Board of Works	10 App. Cas. 229	2
Speyer <i>v.</i> Inland Revenue Commis- sioners	[1908] A. C. 92	51
Stagg <i>v.</i> Elliott	12 C. B. (N.S.) 373	177
State of New South Wales <i>v.</i> The Commonwealth	6 C. L. R. 214	480
Steele <i>v.</i> South Wales Miners' Fede- ration	[1907] 1 K. B. 361	87
Stern <i>v.</i> Reg.	[1896] 1 Q. B. 211	35
Stewart <i>v.</i> Miller	4 Pat. App. 286	359
— <i>v.</i> Wilsons and Clyde Coal Company	5 F. 120	243
Stirling <i>v.</i> Silburn & Pyman	[1910] 1 K. B. 67	515
Stockton and Middlesbrough Water Board <i>v.</i> Kirkleatham Local Board	[1893] 1 Q. B. 375; [1893] A. C. 444	303
Stone <i>v.</i> Rossland Ice and Fuel Com- pany	12 B. C. R. 66	609
Swainson <i>v.</i> North Eastern Railway Company	3 Ex. D. 341	79
Swire <i>v.</i> Francis	3 App. Cas. 106	177

T.

Tanghe <i>v.</i> Morgan	11 B. C. R. 76	609
Thompson <i>v.</i> Bell	10 Ex. 10	178
Thomson <i>v.</i> Advocate-General	12 Cl. & F. 1	28
— <i>v.</i> Anderson	L. R. 9 Eq. 523	459
Thorman <i>v.</i> Dowgate Steamship Com- pany	[1910] 1 K. B. 410	595
Todd, Birlestone & Co. <i>v.</i> North Eastern Railway Company	[1903] 1 K. B. 603	83, 121
Tomkinson <i>v.</i> South Eastern Railway Company	35 Ch. D. 675	90
Toronto Railway Company <i>v.</i> Toronto Corporation	[1906] A. C. 117; [1907] A. C. 315	313
Toronto Street Railway Company <i>v.</i> Toronto Corporation	[1893] A. C. 511	303
Toulmin <i>v.</i> Millar	58 L. T. 96	616
Trevor <i>v.</i> Whitworth	12 App. Cas. 409	440
Tribe <i>v.</i> Taylor	1 C. P. D. 505	624
Tunney <i>v.</i> Midland Railway Company	L. R. 1 C. P. 291	79
Turners <i>v.</i> Whitefield	6 F. 822	230

U.

Uncollected Balances Case	[1903] A. C. 39	630
United States Direct Cable Company <i>v.</i> Anglo-American Telegraph Com- pany	2 App. Cas. 394	561

V.

Vickers v. Vickers	L. R. 4 Eq. 529	PAGE 468
Victorian Daylesford Syndicate v. Dott.	[1905] 2 Ch. 624; [1906] 1 Ch. 747, n.	515
Vyse v. Foster	L. R. 7 H. L. 318	465

W.

Wakelin v. London and South Western Railway Company	12 App. Cas. 41	486
Walker v. Simpson	[1903] A. C. 208	479
Wallace v. Attorney-General	L. R. 1 Ch. 1	28
Wannenburg v. Le Roux	12 S. C. R. 383	578
Wardle v. Bethune	L. R. 4 P. C. 33	602
Warmington v. Palmer	8 B. C. R. 344	608
Wedderburn v. Wedderburn	2 Keen, 722; 4 My. & Cr. 41	468
Wenlock (Baroness) v. River Dee Company	10 App. Cas. 354	90
West Riding of Yorkshire Rivers Board v. Gaunt & Sons	67 J. P. 183; 1 L. G. R. 133	290
— v. Preston & Sons	92 L. T. 24; 69 J. P. 1	290
Weston v. Collins	34 L. J. (Ch.) 358; 13 W. R. 510	337
White v. Dixon	9 R. 375	387
Whitechurch v. Cavanagh	[1902] A. C. 117	177
Wicks v. Dowell & Co.	[1905] 2 K. B. 225	243
Widow Cleeuweek v. Bergh	2 Menzies, 396	579
Williams v. Innes	1 Camp. 364	178
— v. Ocean Coal Co.	[1907] 2 K. B. 422	230
Wilson v. Falconer	Kames, Sel. Dec. 219; Mor. Dict. 167	358
— v. Zulueto	19 L. J. (Q.B.) 49	222
Winans v. Attorney-General	[1904] A. C. 287	27
Wium's Case	2 Menzies, 431	573
Wolfe v. Surrey County Council	[1905] 1 Q. B. 439	8
Wood v. Headingley - cum - Burley Burial Board	[1892] 1 Q. B. 713	8
Worcester v. State of Georgia	6 Peters (31 U. S.), 515	643
Wright v. Ingle	16 Q. B. D. 379	8

Y.

Young v. Kershaw	81 L. T. 531	373
— v. Kingston-on-Thames, &c. Joint Burial Boards	[1907] 1 K. B. 416	10
— v. Turing	2 Man. & G. 593	602

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

LILLEY AND OTHERS APPELLANTS ; H. L. (E.)

AND

1909

LONDON COUNTY COUNCIL RESPONDENTS. March 30.

Metropolis—Street—Building — General Line of Buildings — Superintending Architect's Certificate—Appeal to Tribunal of Appeal—London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 22, 182.

Where under the London Building Act, 1894, the superintending architect has by his certificate defined the general line of buildings in a street, the tribunal of appeal under the Act has no power to define a general line of buildings in that part of the street other than the general line defined by the certificate, if the certificate has not been appealed against and no buildings have been erected since the date of the certificate which altered or might alter the general line defined by it.

The object of the Act was to secure general lines of building to which all must conform.

In November, 1898, the superintending architect by his certificate under the London Building Act, 1894, defined the general line of buildings in the Pentonville Road on the north side between
A. C. 1910.

H. L. (E.) Southampton Street and Winchester Street. That certificate
 1909 was not appealed against. In June, 1906, a question having
 LILLEY arisen between the London County Council and the appellants
 v. as to certain buildings of the appellants between that general
 LONDON line and the Pentonville Road, a certificate was made by the
 COUNTY superintending architect defining the general line of buildings
 COUNCIL. in that part as it was defined by the certificate of November,
 1898. The appellants having appealed against the certificate of
 June, 1906, the tribunal of appeal reversed the certificate of
 June, 1906, and defined the general line of buildings as being in
 front of the general line defined by that certificate, and stated a
 case under s. 182 of the Act for the opinion of the Court. No
 evidence was given that since November, 1898, any building or
 alteration had been erected or made in the premises between
 Winchester Street and Southampton Street. The Divisional
 Court (Darling and A. T. Lawrence JJ.) reversed the decision
 of the tribunal of appeal and restored the certificate of June,
 1906. That decision was affirmed by the Court of Appeal
 (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.).
 Hence this appeal.

March 29, 30. *Sir Robert Finlay, K.C.*, and *Macmorran, K.C.*
 (*A. A. Bethune* with them), for the appellants, contended that
 the tribunal of appeal had power to define anew the general
 line of buildings, and referred to the London Building Act, 1894,
 ss. 22—27, 175, 185; *Spackman v. Plumstead Board of Works* (1);
 and *London County Council v. Metropolitan Ry. Co.* (2)

Avory, K.C., and *Moresby White*, for the respondents, were not
 heard.

LORD LOREBURN L.C. My Lords, I think this appeal must
 fail. The first contention which was made before the tribunal
 of appeal is stated in the special case in the following terms :
 "That the tribunal of appeal could not define a general line of
 buildings in that part of Pentonville Road other than the general
 line of buildings defined by the superintending architect by his
 certificate dated 30th November, 1898, in the absence of evidence

(1) (1885) 10 App. Cas. 229.

(2) [1909] 1 K. B. 116.

of buildings having been erected since that date which might alter or had altered the general line of buildings in that part of the Pentonville Road." I confine myself to that contention, which I think was a sound one, without entering further upon the vexed questions which might arise outside its scope.

In my opinion the object of this Act was to secure a general line of building to which all must conform. If the arguments of Sir Robert Finlay and Mr. Macmorran were to prevail, there might possibly be as many general lines of building in a street as there were houses in the street. I grant that that is an extreme supposition, but still it is theoretically possible, and it certainly would be practically possible that there might be several authoritative general lines of building in the same part of a street. It would be difficult to imagine anything that would give rise to greater confusion than such a condition of the law, as no one would be able to tell with confidence what was the general line of building beyond which projections were not to be permitted. Certainly there is something arbitrary in the provisions of the Act itself. There must necessarily be something arbitrary if the object is to prevent constant litigation and dispute upon matters which might with justice and convenience be entrusted to some competent authority to decide and thereby bind all interests.

It is not necessary to pursue the further points which appear to have been raised by the London County Council. I think that they prevail upon the first contention, and that the judgments of the Divisional Court and the Court of Appeal are sound.

LORD MACNAGHTEN. My Lords, I quite agree. Mr. Macmorran's proposition was this: Every individual owner is entitled to have the general line of building fixed by a certificate relating to his own particular property. It seems to me that it is almost enough to state that proposition to shew that at any rate there must be some difficulty in supporting it. Here the general line of building was laid down in 1898, and as there has been no change in the circumstances affecting that general line of building, neither the tribunal of appeal nor any other authority has power to alter it.

H. L. (E.)

1909

LILLEY

v.

LONDON
COUNTY
COUNCIL.Lord Loreburn
L.C.

H. L. (E.) LORD JAMES OF HEREFORD and LORD SHAW OF DUNFERMLINE
1909 concurred.

LILLEY
v.
LONDON
COUNTY
COUNCIL.

*Order of the Court of Appeal affirmed and appeal
dismissed with costs.*

Lords' Journals, March 30, 1909.

Solicitors: Charles E. Pettit; Edward Tanner.

Distinguished. WESTMINSTER AIR-
WAYS, LTD. v. KUWAIT OIL CO., LTD.
[1950] 2 All E.R. 596.

[HOUSE OF LORDS.]

Considered. WEST-
MINSTER AIRWAYS v.
KUWAIT OIL CO.
[1951] 1 K. B. 134

H. L. (E.) JONES APPELLANT;

1909

AND

April 1, 2. GREAT CENTRAL RAILWAY COMPANY. . RESPONDENTS.

*Practice—Discovery—Production of Documents between Member of Trade Union
and Union Authorities with a view to Assistance in Legal Proceedings—
Privilege between Solicitor and Client.*

A member of a trade union who had been dismissed by his employers furnished the union authorities, as required by the rules, with information in writing to enable the authorities to decide whether he was entitled to bring an action for wrongful dismissal at the expense of the union and with the assistance of their solicitor. The information comprised the evidence available in support of the action and the names of the witnesses. The union authorities sanctioned an action brought by the member, with their solicitor acting as solicitor for the plaintiff. Upon a summons for discovery taken out by the defendants:—

Held, that the letters containing the information did not fall within the established rule as to the privilege between solicitor and client and must be produced.

Anderson v. Bank of British Columbia, (1876) 2 Ch. D. 644, approved.

THE facts material to this appeal are stated in the head-note and in the judgment of Lord Loreburn L.C. The production of the letters was required by an order of the Court of Appeal (Vaughan Williams, Buckley, and Kennedy L.JJ.), affirming an order of Lord Coleridge J. at chambers. Hence this appeal.

April 1, 2. *Sir Robert Finlay, K.C., and Norman Craig, K.C.*
(*Edmond Browne* with them), for the appellant, cited *Anderson v.*

Bank of British Columbia (1) and *Southwark and Vauxhall Water Co. v. Quick*. (2) H. L. (E.)

Scott Fox, K.C., and *Lowenthal*, for the respondents, referred to
Bustros v. White. (3)

1909
JONES
v.
GREAT
CENTRAL
RAILWAY.

LORD LOREBURN L.C. My Lords, I cannot see any room for doubting that this case was rightly decided in the Court of Appeal. Nor can I see how that decision can put at a disadvantage those who are obliged to co-operate in order to obtain legal advice or assistance.

The question arises as follows: Godfrey Jones, a servant of the defendant railway company, had a dispute with his official superiors which ended in his dismissal. He thought himself aggrieved and brought this action. He was a member of a trade union on terms which entitled him to a variety of benefits, and among others to the right of receiving legal assistance in case of unjust dismissal. In such case he was bound by the rules to give full particulars to the authorities of the trade union, and the sanction of the executive committee or of the general secretary was needed before a solicitor was engaged. In the present instance certain letters passed between Godfrey Jones and the officials of the union, containing information about the dispute. They were written before any action was brought in order to satisfy the union authorities that they ought to sanction the employment of a solicitor and to furnish information by which the solicitor should be enabled to conduct the action which the workman contemplated and desired.

The question is whether or not these documents were privileged from disclosure. My Lords, the rule on this branch of the law of discovery is that, in order to enable a man to confide unreservedly in his legal adviser, all communications between client and solicitor are protected. The rule is expressed by James L.J. in the case of *Anderson v. Bank of British Columbia* (4) as follows. He says: "The old rule"—meaning the ancient and venerable rule which still exists—"was that every document in the possession of a party must be

(1) 2 Ch. D. 644.

(2) (1878) 3 Q. B. D. 315.

(3) (1876) 1 Q. B. D. 423.

(4) 2 Ch. D. 644, at p. 656.

H. L. (E.) produced if it was material or relevant to the cause, unless it
 1909 was covered by some established privilege. It was established
 JONES that communications that had passed directly or indirectly
 v. between a man and his solicitor were privileged, and the privilege
 GREAT extended no further." Both client and solicitor may act through
 CENTRAL an agent, and therefore communications to or through the agent
 RAILWAY. are within the privilege. But if communications are made to him
 Lord Loreburn as a person who has himself to consider and act upon them, then
 L.C. the privilege is gone; and this is because the principle which
 protects communications only between solicitor and client no
 longer applies. Here documents are in existence relating to the
 matter in dispute which were communicated to some one who was
 not a solicitor, nor the mere alter ego of a solicitor.

Disclosure is constantly required of letters between partners or
 between a firm and its agents. It is rare in litigation when com-
 munications are confined to letters passing between solicitor and
 client. And every large concern, whether a railway company or
 a trade union or whatever it be, that must needs conduct its
 business by correspondence is amenable to the same rule—
 a rule in itself wholesome, for it favours the placing before a
 Court of justice of all material circumstances that may lead to
 a just decision.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I
 think it is a very clear case.

LORD JAMES OF HEREFORD and LORD SHAW OF DUNFERMLINE
 concurred.

*Order of the Court of Appeal affirmed and appeal
 dismissed with costs.*

Lords' Journals, April 2, 1909.

Solicitors: *Pattinson & Brewer; D. H. Davies.*

[HOUSE OF LORDS.]

WINSTANLEY	APPELLANT ;	H. L. (E.)
AND		1909
NORTH MANCHESTER OVERSEERS . .	RESPONDENTS.	Nov. 18.

Rates—Burial Ground separated from Church—Churchyard—Liability to Poor Rate—Profit derived from Burial Ground—Exemption from Poor Rate—Premises “exclusively appropriated to public religious worship”—Poor Rate Exemption Act, 1833 (3 & 4 Will. 4, c. 30).

A parson in whom was vested by statute the freehold of a burial ground in connection with the church received for his own use burial fees and similar charges :—

Held, that as the beneficial occupier of the burial ground he was liable to the poor rate, and was not exempt by virtue of the Poor Rate Exemption Act, 1833.

Decision of the Court of Appeal, [1908] 1 K. B. 835, affirmed.

THE circumstances of this appeal are stated in the reports of the decisions below, [1907] 1 K. B. 27 and [1908] 1 K. B. 835, and concisely in the judgment of Lord Atkinson.

July 15, 16. *Sir Alfred Cripps, K.C.*, and *Macmorran, K.C.* (*Rhodes, K.C.*, with them), for the appellant. The appellant is not a rateable occupier within the statute 43 Eliz. c. 2. Neither is he the owner of the church or of the churchyard. Every parishioner has a right to be buried in the churchyard, which is under the jurisdiction of the overseers, not of the parson. Fees are charged not in respect of ownership, but for personal services rendered. The case is governed on burial board principles, not by the old law of churchyards. For the powers and rights of burial boards see the Burial Act, 1852 (15 & 16 Vict. c. 85). A burial board can be rated only on the value of the ground before its consecration or setting apart for the burial of the dead. But under the old law of churchyards the rights of the parishioners were the same in respect of churchyards as of the church itself. There was the same right of sanctuary in both. The churchyard in fact was the soil of the church, and the care of the churchyard was in the churchwardens’

H. L. (E.) hands and not the parson's. Their consent is necessary for the burial of non-parishioners: *Prideaux's Churchwardens' Guide*, 16th ed. 374. The clergyman's rights were strictly limited: see 35 Edw. 1, c. 4, "Ne rector prosternat arbores in cœmeterio": Gibson's *Codex*, p. 207. The care and reparation of church and churchyard exclusively belong to the churchwardens: Canon 85 of 1603. The churchwardens had also authority with regard to encroachments: *Anon.*, 1 Ventris, 127 (1672). Churchwardens might maintain a suit against the parson to restrain the pulling down of a churchyard wall: *Marriott v. Tarpley*. (1) The parson had no right to alienate part of the churchyard. "The defendant (the parson) had not power to grant any privilege, except for the particular burial then about to take place": Bayley J. in *Bryan v. Whistler*. (2) The test is whether a profit is made out of the occupation: *Robson v. Hyde*. (3) That was the case of a private building used as a chapel and not consecrated. Lord Mansfield said (4): "If indeed it were absolutely given to the public it might be a strong ground to say that it was not rateable. . . . He might convert it into an assembly or concert room; and in that shape would it not be rateable?" The parson was held not rateable in respect of income which was not received in lieu of tithes: *Reg. v. Christopherson*. (5) By the consecration of a church in the Church of England "the status of the building and of the soil is altered. The building is by the ecclesiastical law separated for ever from the common uses of mankind": per Bowen L.J. in *Wright v. Ingle* (6); see also *Reg. v. Twiss*. (7) *Beswick v. Alker* (8) and *Wolfe v. Surrey County Council* (9) were registration cases, and the occupation of the house and the receipt of payments were held to be separable. In *Wood v. Headingley cum Burley Burial Board* (10) Coleridge C.J. said: "The rights of the incumbents are limited to sacred rights:" . . . the incumbent "has the same rights quoad sacra

(1) (1838) 9 Sim. 279.

(2) (1828) 8 B. & C. 288.

(3) (1783) Caldecott, 310.

(4) *Ibid.* at p. 314.

(5) (1885) 16 Q. B. D. 7.

(6) (1885) 16 Q. B. D. 379, 399.

(7) (1869) L. R. 4 Q. B. 407, 412.

(8) (1872) L. R. 8 C. P. 265.

(9) [1905] 1 Q. B. 439.

(10) [1892] 1 Q. B. 713, at p. 727.

only in the burial ground as he had in the churchyard; his rights of property are taken away." The parson's freehold in the church and churchyard is held on trust for the parishioners: see Bowen L.J.'s judgment in *M'Gough v. Lancaster Burial Board*. (1) In respect of the churchyard or burial ground the parson is in the same position as the London County Council in the Brockwell Park case: *Lambeth Overseers v. London County Council*. (2) Lord Herschell described the county council as "custodians or trustees to hold and manage it for the use of the public," and not occupiers for rating purposes.

H. L. (E.)
1909
WINSTANLEY
v.
NORTH
MANCHESTER
OVERSEERS.

Edmund Sutton (*Gordon Hewart* with him), for the respondents. The parson of a parish is as completely a freeholder as a man can be: see Com. Dig., art. Cemetery. "The soil and profits of the church and churchyard belong to the parson": 2 Rolle, "Parson," 337. He can make a lease: *Beckwith v. Harding*. (3) The rights and duties of the rector or vicar are stated by Blackburn J. in *Greenslade v. Darby* (4) in the passage cited by Sir Gorell Barnes P. in the Court of Appeal. The parishioners have a right to be buried in the churchyard, but not in a particular place nor in a particular manner, and fees may be charged according to custom or under an Act of Parliament: *Dean of Exeter's Case* (5); *Ex parte Blackmore* (6); *Rex v. Coleridge*. (7) The parson is "freeholder of the church and churchyard," as Bramwell B. said in *Nevill v. Bridger*. (8) It was there held that the parson may make a contract for payment of a fee for the burial of a non-parishioner. Apart from possession of the freehold there would be no right to bury a non-parishioner: see *De Romana v. Roberts* (the Perivale Faculty). (9) The position of the clergyman is not affected by the circumstance that the churchyard is not "unius ætatis," but also "the common property of the living and of generations yet unborn and subject only to temporary appropriation," as Sir William Scott said in *Gilbert v. Buzzard*. (10) There the parson's rights in respect of the manner of burial were asserted. In

(1) (1888) 21 Q. B. D. 323.

(2) [1897] A. C. 625, 632.

(3) (1818) 1 B. & Al. 508.

(4) (1868) L. R. 3 Q. B. 421, 429.

(5) (1706) 1 Salk. 334.

(6) (1830) 1 B. & Ad. 122.

(7) (1819) 2 B. & Al. 806.

(8) (1874) L. R. 9 Ex. 214.

(9) [1906] P. 332.

(10) (1820) 3 Phillim. 335, 357.

H. L. (E.) 1909
 WINSTANLEY v. NORTH MANCHESTER OVERSEERS.
 ———

Maidman v. Malpas (1) proceedings by a rector against a person erecting a monument in a church without a faculty were sustained. In *Clifford v. Wicks* (2) the grant of a part of a chancel by a lay impropiator was held invalid. See also *Rich v. Bushnell* (3); *Seager v. Bowle*. (4) The appellant is certainly rateable as occupier. The words of Vaughan Williams L.J., "ground earning fees," in *Young v. Kingston-on-Thames, &c., Joint Burials Board* (5) simply import rateability as occupier, and do not refer to fees for services—surplice or customary fees. Ridley J. was wrong in his reference to surplice fees, which are expressly excluded in the case. The vicar of a parish was held in *Reg. v. Capel* (6) to be rateable as occupier. On this point see also *Bishop of Ely v. Gibbons* (7); *Vestry of St. Giles, Camberwell v. London Cemetery Co.* (8) *Putney Overseers v. London and South Western Ry. Co.* (9) is not applicable. An occupation to be rateable need not be profitable, if it is beneficial: *Mersey Docks and Harbour Board v. Cameron*. (10) On what constitutes occupation and exclusive occupation see *Lord Bute v. Grindall* (11); *Rex v. Bell* (12); *Rex v. Mayor, &c., of London* (13); *Bruce and Bath River Navigation Co. v. Willis* (14); *Heath v. Haynes* (15); *Allan v. Liverpool Overseers* (16); *Holywell Union Assessment Committee v. Halkyn District Mines Drainage Co.* (17); *Rex v. Melladew*. (18) The mere fact that it has not been usual to rate the parson for the occupation of the churchyard does not affect the question. In *Reg. v. Ellis* (19) it was held that the inhabitants of a parish had no power to bind their successors to continue an exemption which had been enjoyed for 125 years. See also Lord Campbell C.J.'s judgment in *East London Waterworks Co. v. Trustees for Mile End Old Town*. (20) The case of *Lambeth Overseers v. London*

(1) (1794) 1 Hagg. Cons. 205.

(2) (1818) 1 B. & Al. 498.

(3) (1827) 4 Hagg. Ecc. 164.

(4) (1823) 1 Add. 541.

(5) [1907] 1 K. B. 416, 420.

(6) (1840) 12 Ad. & E. 382.

(7) (1833) 4 Hagg. Ecc. 156.

(8) [1894] 1 Q. B. 699.

(9) [1891] 1 Q. B. 440.

(10) (1865) 11 H. L. C. 443, 486.

(11) (1786) 1 T. R. 338.

(12) (1798) 7 T. R. 598.

(13) (1790) 4 T. R. 21.

(14) (1840) 11 Ad. & E. 463.

(15) (1857) 27 L. J. (C.P.) 50.

(16) (1874) 43 L. J. (M.C.) 69.

(17) [1895] A. C. 117.

(18) [1907] 1 K. B. 192.

(19) (1842) 12 L. J. (M.C.) 20.

(20) (1851) 17 Q. B. 512, 522.

County Council (1) is wholly different. There Lord Halsbury H. L. (E.)
L.C. said, "Here there is no possibility of beneficial occupation 1909
by the county council." A churchyard is wholly for the WINSTANLEY
benefit of the parishioners. *Greig v. University of Edinburgh* (2), v.
where the university was held not exempt, is more in point. NORTH
MANCHESTER
OVERSEERS.

Sir A. Cripps, K.C., in reply.

The House took time for consideration.

Nov. 18. LORD LOREBURN L.C. My Lords, in this case my noble and learned friend Lord Atkinson has, in an opinion which I have had an opportunity of reading, dealt so fully with the arguments that I need only summarize in a few words my reason for agreeing with the judgment under appeal.

It is clear that cemetery companies are rateable in respect of their beneficial occupation of cemeteries. In principle I perceive no difference between that case and the case of a parson in beneficial occupation of a churchyard if he be the occupier. And he must, I think, be the occupier because he has the freehold and the right to direct where deceased persons are to be buried, together with the right to allow special kinds of interment or to permit persons other than parishioners to be there interred.

For the exercise of some, at all events, of these rights he may charge fees. No one else can be said to occupy, and it seems to me impossible, having regard to the use made of the ground for profit, to say that there is no occupation in any one, or that if it be in the parson it is not beneficial.

My only difficulty has been that there is no precedent for thus rating a parson in all the years which have passed since the statute of Elizabeth. When there has been in fact no such rating for so long a time, I strongly incline to find, or even to presume, a lawful origin for a long-continued immunity, if the case admits of it. But this case depends upon statute, not upon common law which is rooted in custom; and there has been no such construction put upon the statute as to preclude a Court from interpreting it as it stands, as in any other case.

I agree also with Lord Atkinson in thinking that the profit is

(1) [1897] A. C. 625.

(2) (1868) L. R. 1 Sc. 348.

H. L. (E.) incidental to the parson's occupation of the churchyard and not
1909 to his office, though but for the office he would not be the
WINSTANLEY occupant, and I can add nothing to the reasons he advances
v. for this opinion.
NORTH
MANCHESTER
OVERSEERS.

LORD ATKINSON. My Lords, in this case the appellant is the rector and incumbent of All Saints' church in the township of North Manchester, in the city of Manchester. He has been rated "as the owner and occupier of All Saints' cemetery, situated in Newton Heath, in the parish of North Manchester, same not being agricultural land," in the sum of 83*l.* 10*s.*, as the rateable value thereof. This sum has been fixed in respect of certain moneys purporting to have been received by him for "the sale of freehold graves" in the said cemetery. If he be liable there is no dispute as to the amount.

The cemetery, which has been duly consecrated, is vested in the appellant by s. 13 of the Act 8 & 9 Vict. c. 70 "for the use of the inhabitants of the place for which such burial ground was acquired," namely, the said parish of North Manchester. Nothing turns upon the wording of this statute, as Sir Alfred Cripps, as I understood, did not contend on behalf of the appellant that he had any estate or interest in, or right over, this burial ground more extensive than, or different in nature and character from, those possessed and enjoyed in the ordinary case by the rector of a parish in and over the graveyard attached to his church.

The case was argued before your Lordships on that basis, and its difficulty and importance in some degree depend upon that consideration. The question for decision is therefore a general one, namely, the rateability of the rector of a parish, as the occupier of the parish cemetery, in respect of the burial fees claimed and received by him for the interment therein, in places designated by him, of the deceased inhabitants of such parish and others.

That question, in my view, resolves itself into the three questions following, namely: 1. Does the appellant occupy this cemetery for which he is rated? 2. If he does, is his occupation a beneficial one, that is, a thing of value? 3. What is the measure of that value?

In *Beckwith v. Harding* (1) Lord Ellenborough defines the rector's position in relation to the parish church: The freehold is vested in him. By his induction into his living he has full and entire possession of it and can maintain an action of trespass in respect of it.

H. L. (E.)
1969
WINSTANLEY
v.
NORTH
MANCHESTER
OVERSEERS.
Lord Atkinson.

In *Greenslade v. Darby* (2) the contest arose between the lay rector and impropriator of a certain church and the perpetual curate of the same church, who had been duly nominated, licensed, and instituted in the benefice. The lay rector claimed the right to depasture the churchyard with sheep, and the curate instituted an action of trespass against him in respect of the assertion of this right. Lord Blackburn in his judgment dealt with their respective rights in the following passage: "Originally the land was the property of some lay person which, when the rectory was formed, was dedicated to the church and conveyed by him to the rector. Thus the freehold was vested in the rector and he was entitled to the land, including the grass, herbage, and everything else, as fully as the original owner had been; but as the land had been set apart by consecration for the church and churchyard, the right which the rector as owner of the freehold had in the profits was proportionally diminished because he could not desecrate it, or use it for any purpose which was inconsistent with the object of its consecration. Nevertheless the enjoyment of the property so far as could be exercised by one holding a sacred office belonged to the rector as owner of the freehold."

Of the perpetual curate he says (3): "He must likewise have such possession as is necessary for the performance of his sacred duties, but there is no reason in law why the perpetual curate should now have such a possession as to enable him to take the profits arising from the use of the churchyard for secular purposes." And again, "The perpetual curate is no doubt in possession of the churchyard for ecclesiastical purposes, that is to say, for the purposes of burial and the like." The curate and his predecessors had, in fact, always received, for his and their own use and benefit, fees for brick graves and headstones from time to time opened and put up in the churchyard. It follows,

(1) 1 B. & Al. 508.

(2) L. R. 3 Q. B. 421, 429.

(3) Ibid. at p. 431.

H. L. (E.) I think, that where the rector is not a layman, but is himself the officiating clergyman, he must have in him the right of both the lay rector and the curate in the above case, that is the full right of the owner of the freehold in actual possession, limited only by three considerations—first, the consideration of the churchyard being consecrated; second, the right of sepulture in it which all the inhabitants of the parish, and possibly all who die there, are entitled to; and third, a restriction on cutting trees growing upon it, because these are presumed to have been planted to provide timber for the repairs of the church.

1909
WINSTANLEY
v.
NORTH
MANCHESTER
OVERSEERS.
Lord Atkinson.

According to some authorities the rector would, however, be entitled not only to the herbage of the churchyard, but to timber growing on it, if blown down by a storm.

In Comyn's Digest, title Ecclesiastical Persons, it is stated: "The parson is seized in right of his church, and the freehold of the church, churchyard, and glebe belong to him." "The churchwardens or ordinary cannot license to bury within the church, but the parson, for the frank tenement is in him only." And see Cro. Jac. 367. In the *Dean and Chapter of Exeter's Case* (1) it is said, "No fee is due for burial of common right, but where a licence is necessary the person giving it may stand upon his own price."

It is quite true, no doubt, that the ownership of a hereditament does not necessarily imply occupation for the purpose of rating, and a person or company may be an occupier within the meaning of the statute of Elizabeth who has no proprietary interest in the soil: *Holywell Union v. Halkyn Drainage Co.* (2) But owners in possession are prima facie occupiers, unless it be shewn that the occupation is in some one else: per Buller J. (3), and Lord Herschell, in *Holywell Union v. Halkyn Drainage Co.* (4) In the first of these cases Lord Kenyon apparently considered that a person who had such possession of land as would enable him to bring an action of trespass must be held to be in occupation, unless it was proved that some other person was in occupation. It would, therefore, appear to me that the appellant is in "occupation" of this graveyard, despite any right of supervision or

(1) 1 Salk. 334.

(3) 4 T. R. 21.

(2) [1895] A. C. 117.

(4) [1895] A. C. 117, at p. 121.

control which the churchwardens may be entitled to. Whether this occupation is a beneficial occupation—a thing of value within the meaning of the statute of Elizabeth—or not depends upon whether the occupier is or is not by law debarred from deriving any benefit from it. If it is merely by his own volition, and not by the law, that he is deprived of a benefit which he might have received, then there is a “potential beneficial occupation,” and he is liable to be rated in respect of it: *Putney Bridge Case* (1), approved of in *Lambeth Overseers v. London County Council*. (2)

It is clear, I think, in the present case that the appellant is not debarred by law from deriving some benefit from his occupation of the graveyard. His occupation of it is therefore beneficial. If so, he is rateable in respect of it, at least to some extent. The real question, however, remains: Does he receive these burial fees by reason of his occupation? Are they “incidental” to his occupation and the fruit of it, so that without it he could not exact them? For the purposes of this question it is, I think, immaterial what the precise legal nature of the right and interest acquired by the so-called purchase of graves may be; whether it be the ownership of a particular portion of the soil of the churchyard, or an easement of the nature of a perpetual and exclusive right of interment in that portion of the soil, or merely a like easement for a limited time, namely, till the remains of the deceased sink into dissolution and return to earth, is a matter of indifference, provided only the rector confers those rights for which he receives fees, as “incidental” to his occupation of the burial ground.

In *Greenslade v. Darby* (3) Lord Blackburn, as already pointed out, considered that it was necessary for the perpetual curate to have the right “of possession of the” churchyard for the purposes of burial.

The inhabitants of the parish have according to law a general right of sepulture in the churchyard, and that right, if denied, will be enforced by mandamus: *Ex parte Blackmore* (4); *Rex v. Coleridge* (5); but the right to select the place of interment is in

H. L. (E.)
1909
WINSTANLEY
v.
NORTH
MANCHESTER
OVERSEERS.
Lord Atkinson.

(1) (1881) 7 Q. B. D. 223.

(3) L. R. 3 Q. B. 421.

(2) [1897] A. C. 625.

(4) 1 B. & Ad. 122.

(5) 2 B. & Al. 806.

H. L. (E.) 1909
 WINSTANLEY
 v.
 NORTH
 MANCHESTER
 OVERSEERS.
 Lord Atkinson.

the rector, and for the permission to be buried in any particular place or apparently in an unusual manner, such as an iron coffin, or in a vault, or with other unusual accompaniments, he can demand a fee. Again, he can permit persons who neither lived nor died in his parish, and were not his parishioners in any sense, to be buried in the churchyard, and can exact a fee beyond the usual burial fee for the privilege : *Nevill v. Bridger*. (1)

Yet these so-called strangers have no rights in the churchyard, no claims upon the services of the parson ; he does not by virtue of his office owe them any duty, ecclesiastical or legal. It cannot, therefore, be that it is by virtue of his office he exacts these fees from them ; and if not by virtue of his office, it can only be by virtue of his ownership and occupation of the soil. If he should permit these strangers to be buried in the churchyard in such numbers as to trench upon the general right of sepulture belonging to the inhabitants of the parish, he could be restrained by the Ordinary, but subject to that he may allow them to be buried there in such numbers as he may deem fit, and exact what fees he pleases. It seems to me impossible to hold that in these cases, at all events, the fees received are not incidental to the occupation of the soil of the graveyard. But though the position of the inhabitants of the parish is differentiated from that of the stranger by the fact that the former has a right of sepulture there and the latter has not, the rector, I think, selects the place of interment and exacts the fee by virtue of the same right and title in the one case as in the other.

In *Greig v. University of Edinburgh* (2) Lord Cairns points out that the university received matriculation fees from students who attend in their buildings, which fees would not be paid unless there were buildings of which students could have the benefit for the purpose of receiving instruction, and, further, that the professors were allowed to receive fees from students who attended their classes, without which the salaries of the professors would presumably have to be increased by the university ; that the university thus had the benefit of the fees paid to the professors, but that these fees would not be paid unless there were proper class-rooms in which the

(1) L. R. 9 Ex. 214.

(2) L. R. 1 Sc. 348, at p. 351.

professors could deliver these instructions. The university were accordingly held liable to be rated as occupiers of their buildings, the fees being taken into account in estimating the value of the occupation.

Lord Westbury at p. 355 puts the point of the decision thus: "But the University of Edinburgh is the occupant of the property in a character and for a purpose which entitles it to receive, and in respect of which it does actually receive, a certain amount of pecuniary value which must be regarded as incidental to its occupation."

It was further urged on behalf of the appellant that the burial ground was impressed with a trust for the benefit of the inhabitants of the parish, but that has long ceased to be a ground of exemption, unless the terms of the trust are such as to debar the occupier from receiving any benefit or profit from the occupation: *Mayor of Lincoln v. Holmes Common* (1); *Rex v. Sudbury* (2); *Jones v. Mersey Docks and Harbour Board*. (3) Where the occupation is such that it produces profit, it is immaterial whether the profit is retained by the occupier for his own benefit or is paid over by him to others.

In the view I take, it is unnecessary to deal with one of the points strongly urged by Mr. Sutton in his lucid and able argument, namely, that the appellant having purported to sell graves, i.e., part of the freehold of the lands, and received the price, he ought not to be permitted now, in order to escape liability for rates, to say that the soil of the graveyard was inalienable and that what he did was illegal. He clearly had the title and the power to vest some right or interest in the grave he purported to sell. If he did that by virtue of his ownership and occupation of the ground he is, in my opinion, rateable. The last point urged on behalf of the appellant is the absence of all precedent. This is not a case, however, like *Morgan v. Crawshay* (4), in which one particular construction has been for many centuries put upon the statute of Elizabeth. As coal mines are the only mines mentioned in that statute, it had been uniformly held that it applied to none other. There had been no conflicting decisions one way or the

H. L. (E.)
1909
WINSTANLEY
v.
NORTH
MANCHESTER
OVERSEERS.
Lord Atkinson.

(1) (1867) L. R. 2 Q. B. 482.

(3) (1865) 11 H. L. C. 443.

(2) (1823) 1 B. & C. 389.

(4) (1871) L. R. 5 H. L. 304, 315.

H. L. (E.) other, as there were in *Jones v. Mersey Docks and Harbour Board* (1), and the old construction was adhered to, though its
 1909 soundness was doubted, on the ground that to disagree with it
 WINSTANLEY would shake rights and titles which had been founded through
 v. many years, on the conviction that this was the true inter-
 NORTH pretation and would not be departed from.
 MANCHESTER
 OVERSEERS.

Lord Atkinson.

In this case the rateability of the parson has never apparently been the subject of judicial decision, and the dangers referred to in the last case could hardly arise. The point for decision is, in truth, the measure of the parson rateably, rather than the construction of the statute of Elizabeth. Occupancy in itself is a matter of fact rather than a matter of law. Many reasons may be found for the omission to rate the rector for his graveyard. It may well be, as was suggested, that until recent years the fees received were so small that they escaped attention; but if the practice of allowing him to escape rating be, to use the words of Lord Macnaghten in *Hamilton v. Baker* (2), "really founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes your Lordships from correcting the error."

It was, I think, not seriously disputed that the Act of 1840 (3 & 4 Vict. c. 89) left the parson's position as to rateability substantially what it was under the statute of 43 Eliz. c. 2. Much weight seems to have been given in the Court of Appeal to the circumstance that the parson is named in the statute of Elizabeth, but he is only named, I think, as one of the inhabitants; the words are "every inhabitant, parson, vicar and others." He is made rateable for tithes, but only as an "occupier" of tithes; and I do not think the fact that he is so named can justify any conclusion that he, any more than any other inhabitant, is rateable on income not derived from, arising out of, or incidental to the "occupation" of a hereditament within the parish.

On the whole, therefore, I am, for the reasons above given, of opinion that the decision of the Court of Appeal was right, and that this appeal should be dismissed with costs.

(1) 11 H. L. C. 443.

(2) (1889) 14 App. Cas. 209, 222.

LORD MACNAGHTEN. My Lords, I have also had the advantage of reading in print and considering the judgment of my noble and learned friend Lord Atkinson, and I entirely agree with it. H. L. (E.)
1909

WINSTANLEY

v.

NORTH
MANCHESTER
OVERSEERS.

LORD COLLINS. My Lords, I am of the same opinion.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with the opinion of Lord Atkinson which has just been read, and have nothing to add.

LORD LOREBURN L.C. My Lords, I have to say that Lord James of Hereford concurs in the judgment of myself, approving that of Lord Atkinson.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 18, 1909.

Solicitors: *Rooke & Sons, for Orford & Sons, Manchester; Chester, Broome & Griffithes, for Crofton, Craven & Worthington, Manchester.*

[HOUSE OF LORDS.]

H. L. (E.)
1909
Dec. 6.
—

E. HULTON & CO.
AND
JONES
Defamation—Libel in Newspaper—Publication—Intention to defame Plaintiff

APPELLANTS;
RESPONDENT.

In an action for libel it is no defence to shew that the defendant did not intend to defame the plaintiff, if reasonable people would think the language to be defamatory of the plaintiff.

The appellants, owners and publishers of a newspaper, published in an article defamatory statements of a named person believed by the author of the article and the editor of the paper to be a fictitious personage with an unusual name. The name was that of the respondent, who was unknown to the author and the editor. In an action for libel against the appellants it was admitted that neither the writer nor the editor nor the appellants intended to defame the respondent, but evidence was given by his friends that they thought the article referred to him :—

Held, that the plaintiff was entitled to maintain the action.

Decision of the Court of Appeal, [1909] 2 K. B. 444, affirmed.

MR. ARTEMUS JONES, a barrister in practice, had been at one time on the staff of the *Sunday Chronicle*, a newspaper owned and published by the appellants, and contributed articles signed by himself to some of the appellants' publications. The appellants published in the *Sunday Chronicle* an article defamatory of a person described as "Artemus Jones." The article is set out in the report of the decision below. At the trial before Channell J. and a special jury at Manchester of an action brought by the respondent against the appellants, friends of the respondent gave evidence that they had read the libel and believed it to refer to the respondent. The evidence of the author of the article and of the editor of the *Sunday Chronicle* that they did not know of the existence of the respondent was accepted as true by the respondent's counsel. The jury found a verdict for the plaintiff for 1750*l.* damages, and judgment was entered for him. Upon an application by the defendants to set aside the verdict and judgment and to order a new trial, or alternatively to enter judgment for the defendants, the Court of Appeal (Lord Alverstone C.J. and Farwell L.J., Fletcher Moulton L.J. dissenting)

affirmed the judgment and dismissed the application. Hence this appeal. H. L. (E.)

1909

E. HULTON
& Co.
v.
JONES.

Dec. 3, 6. *Norman Craig, K.C. (Isaacs, K.C., with him)*, for the appellants. It is a necessary element in a cause of action for libel that the words complained of should have been written "of and concerning" the plaintiff. There must have been intention in the writer to apply the words to the plaintiff, and there can be no such intention when the writer does not know even of the existence of the person who imagines the language to be directed to himself. The principle of innuendo has never been applied where the question is one of identity. No doubt a man must be taken to know the reasonable construction of the words he employs; but he cannot know every combination of names in the directory. This principle has been recognized and enforced for centuries. In *Johnson v. Aylmer* (1), on motion for arrest of judgment, it was held that in the absence of express statement that the words applied to the plaintiff the action could not be maintained. The same doctrine was applied and judgment arrested in *Lowfield v. Bancroft*. (2) In *Rex v. Horne* (3) Lord Mansfield said: "The gist of every charge of every libel consists in the person or matter of and concerning whom or which the words are averred to be said or written." In *Rex v. Lord Abingdon* (4) Lord Kenyon said: "In order to constitute a libel the mind must be in fault and shew a malicious intention to defame." He added that if the language was inadvertently used it would not be a libel. In the present case the words were inadvertently used; there could have been no intention; the mind was not at fault. There may, of course, be indications, intelligible to those who know the circumstances, which point to a particular person, as in *Le Fanu v. Malcolmson* (5), where language was used of a class of Irish factories which clearly pointed to the plaintiff, and in *Bourke v. Warren* (6), where asterisks were used which seemed to suggest the plaintiff. There, notwithstanding the summing up of Abbott C.J. that the question was whether those who knew the

(1) (3 Jac. 1) 1 Cro. Jac. 126.

(2) (5 Geo. 2) 2 Str. 934.

(3) (1777) Cowp. 672, 679.

A. C. 1910.

(4) (1794) 1 Esp. 226.

(5) (1848) 1 H. L. C. 637.

(6) (1826) 2 C. & P. 307.

H. L. (E.) plaintiff would think that the plaintiff was designated, the verdict
1909 was for the defendant. The question is who was meant.

E. HULTON [LORD LOREBURN L.C. Is it not rather who was hit?]
& Co.

v.
JONES. No. A man cannot be held responsible for remote and improbable results of his actions. The case most favourable to the respondent is *Harrison v. Smith* (1), where the name of the plaintiff was General Plantagenet Harrison, and the defendant denied knowledge of his existence. The description, however, in the libel was applicable in several respects to the plaintiff, and Lush J. said he had no doubt that the plaintiff was the person intended to be described. Here none of the facts connected with the imaginary Artemus Jones were true of the plaintiff. In *Harrison v. Smith* (1) Lush J. said that if the name were purely fictitious, the creature of the writer's fancy, there would be no libel. The coincidence of name is as purely accidental as that of the American novelist Winston Churchill and the English Minister of State, or of A. L. Smith, the late Master of the Rolls, and the distinguished tutor of Balliol. It cannot be said that the writer was reckless or careless. The name was chosen in order to avoid possibility of libel. There was nothing to suggest the plaintiff like "the certain newspaper" in *Latimer v. Western Morning News*. (2) There is a difference between mere negligence in making a statement and recklessness whether the statement be true or false, innocent or libellous: *Le Lievre v. Gould* (3), per Bowen L.J., commenting on *Derry v. Peek*. (4) Negligence, however, does not enter into the law of libel, though recklessness may. The question is whether the writer had a guilty mind, a guilty intention. The intention must be that of the writer, and the expression that a man must be understood as intending "the natural meaning of his own words" is loose and misleading. The test is not the impression of bystanders or the influence of friends, but whether the defendant used words which were admittedly defamatory "of and concerning" the plaintiff. The damages were excessive and out of all proportion to the injury suffered.

(1) (1869) 20 L. T. 713.

(2) (1871) 25 L. T. 44.

(3) [1893] 1 Q. B. 491, 501.

(4) (1889) 14 App. Cas. 337.

Hewart (Lush, K.C., with him), for the respondent. In an action for libel it is a question for the jury, and the jury only, whether the words complained of are a libel on the plaintiff. The statement of the writer with respect to his own intention is irrelevant, and still more so where the action is brought against persons other than the writer for publishing and circulating the defamatory statements. In *Gibson v. Evans* (1) Lord Coleridge C.J. said: "It does not signify what the writer meant. The question is whether the alleged libel was so published by the defendant that the world would apply it to the plaintiff." That is particularly so here, for the world in which the appellants' papers were circulated was well acquainted with the respondent. From 1892 to 1904 the respondent's name was familiar to the appellants' office. From 1901 to 1904 he was well known on a neighbouring circuit. The proof readers ought to have recognized the name. Mr. Edward Hulton, the appellants' managing director, admitted that he remembered the respondent well, and that he was rather surprised at the appearance of the name Artemus Jones in the article, and that he looked over the paper when it was produced with great care. The damages were not excessive in view of the gross character of the libel, and they were entirely for the jury. The observations at the close of Farwell L.J.'s judgment are just and appropriate.

Norman Craig, K.C., in reply.

LORD LOREBURN L.C. My Lords, I think this appeal must be dismissed. A question in regard to the law of libel has been raised which does not seem to me to be entitled to the support of your Lordships. Libel is a tortious act. What does the tort consist in? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by shewing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both. He has none the less imputed something disgraceful and has none the less injured the plaintiff. A man in good faith may publish a libel believing it to be true,

H. L. (E.)

1909

E. HULTON

& Co.

v.

JONES.

H. L. (E.) 1909
 E. HULTON & CO.
 v.
 JONES.
 Lord Loreburn L.C.

and it may be found by the jury that he acted in good faith believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the action, however excellent his intention. If the intention of the writer be immaterial in considering whether the matter written is defamatory, I do not see why it need be relevant in considering whether it is defamatory of the plaintiff. The writing, according to the old form, must be malicious, and it must be of and concerning the plaintiff. Just as the defendant could not excuse himself from malice by proving that he wrote it in the most benevolent spirit, so he cannot shew that the libel was not of and concerning the plaintiff by proving that he never heard of the plaintiff. His intention in both respects equally is inferred from what he did. His remedy is to abstain from defamatory words.

It is suggested that there was a misdirection by the learned judge in this case. I see none. He lays down in his summing up the law as follows: "The real point upon which your verdict must turn is, ought or ought not sensible and reasonable people reading this article to think that it was a mere imaginary person such as I have said—Tom Jones, Mr. Pecksniff as a humbug, Mr. Stiggins, or any of that sort of names that one reads of in literature used as types? If you think any reasonable person would think that, it is not actionable at all. If, on the other hand, you do not think that, but think that people would suppose it to mean some real person—those who did not know the plaintiff of course would not know who the real person was, but those who did know of the existence of the plaintiff would think that it was the plaintiff—then the action is maintainable, subject to such damages as you think under all the circumstances are fair and right to give to the plaintiff."

I see no objection in law to that passage. The damages are certainly heavy, but I think your Lordships ought to remember two things. The first is that the jury were entitled to think, in the absence of proof satisfactory to them (and they were the judges of it), that some ingredient of recklessness, or more than recklessness, entered into the writing and the publication of this article, especially as Mr. Jones, the plaintiff, had been employed on this very newspaper, and his name was well

known in the paper and also well known in the district in which the paper circulated. In the second place the jury were entitled to say this kind of article is to be condemned. There is no tribunal more fitted to decide in regard to publications, especially publications in the newspaper Press, whether they bear a stamp and character which ought to enlist sympathy and to secure protection. If they think that the licence is not fairly used and that the tone and style of the libel is reprehensible and ought to be checked, it is for the jury to say so; and for my part, although I think the damages are certainly high, I am not prepared to advise your Lordships to interfere, especially as the Court of Appeal have not thought it right to interfere, with the verdict.

H. L. (E.)

1909

E. HULTON
& Co.

v.

JONES.

Lord Loreburn
L.C.

LORD ATKINSON. My Lords, I concur with the judgment which has been delivered by my noble and learned friend on the woolsack, and I also concur substantially with the judgment delivered by Farwell L.J. in the Court of Appeal. I think he has put the case upon its true ground, and I should be quite willing to adopt in the main the conclusions at which he has arrived.

LORD GORELL. My Lords, I concur also with the judgment which has been pronounced by the Lord Chancellor. I also wish to express my concurrence with the observations which my noble and learned friend Lord Atkinson has made upon the judgment of Farwell L.J.

LORD SHAW OF DUNFERMLINE. My Lords, I concur in the observations which have been made by the Lord Chancellor, but for my own part I should desire in terms to adopt certain language which I will now read from the judgment of the Lord Chief Justice: "The question, if it be disputed whether the article is a libel upon the plaintiff, is a question of fact for the jury, and in my judgment this question of fact involves not only whether the language used of a person in its fair and ordinary meaning is libellous or defamatory, but whether the person referred to in the libel would be understood by persons who knew him to refer to the plaintiff."

My Lords, with regard to this whole matter I should put my

H. L. (E.) propositions in a threefold form, and, as I am not acquainted by training with a system of jurisprudence in which criminal libel has any share, I desire my observations to be confined to the question of civil responsibility.

1909
E. HULTON
& Co.
v.
JONES.

Lord Shaw of
Dunfermline.

In the publication of matter of a libellous character, that is matter which would be libellous if applying to an actual person, the responsibility is as follows: In the first place there is responsibility for the words used being taken to signify that which readers would reasonably understand by them; in the second place there is responsibility also for the names used being taken to signify those whom the readers would reasonably understand by those names; and in the third place the same principle is applicable to persons unnamed but sufficiently indicated by designation or description.

My Lords, I demur to the observation so frequently made in the argument that these principles are novel. Sufficient expression is given to the same principles by Abbott C.J. in *Bourke v. Warren* (1) (cited in the proceedings), in which that learned judge says: "The question for your consideration is whether you think the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant." I think it is out of the question to suggest that that means "meant in the mind of the writer" or of the publisher; it must mean "meant by the words employed." The late Lord Chief Justice Coleridge dealt similarly with the point in *Gibson v. Evans* (2), when in the course of the argument he remarked: "It does not signify what the writer meant; the question is whether the alleged libel was so published by the defendant that the world would apply it to the plaintiff."

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 6, 1909.

Solicitors: *Lewis & Lewis; Nicol, Son & Jones, for Pickstone & Jones, Radcliffe.*

(1) 2 C. & P. 307.

(2) 23 Q. B. D. 384, at p. 386.

[HOUSE OF LORDS.]

WINANS AND ANOTHER APPELLANTS; H. L. (E.)

AND

ATTORNEY-GENERAL (No. 2) RESPONDENT.

1909

Dec. 7.

Revenue—Estate Duty—Foreign Bonds payable to Bearer—Bonds physically situate in the United Kingdom—Marketable Securities—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1; s. 2, sub-s. 2.

Foreign bonds and certificates payable to bearer, passing by delivery, and marketable on the London Stock Exchange are, when physically situate in the United Kingdom at the death of the owner, liable to estate duty under the Finance Act, 1894, even though the deceased was a foreigner domiciled abroad.

Decision of the Court of Appeal, [1908] 1 K. B. 1022, affirmed.

WILLIAM LOUIS WINANS was the owner of foreign Government and other bonds and certificates and was held to have been domiciled in the United States at the time of his death: *Winans v. Attorney-General*. (1) The bonds (a list of which is given in the report of the decision of the Court of Appeal) were payable to bearer, marketable on the London Stock Exchange, and passed by delivery. At his death they were physically situate in England, where he died. Bray J. held that the bonds were liable to estate duty, and this decision was affirmed by the Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Buckley L.JJ.). Hence this appeal.

Sect. 1 of the Finance Act, 1894, runs thus: In the case of every person dying after the commencement of this part of this Act, there shall, save as herein-after expressly provided, be levied and paid, upon the principal value ascertained as herein-after provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty called "estate duty," at the graduated rates herein-after mentioned, and the existing duties mentioned in the First Schedule to this Act shall not be levied in respect of property chargeable with such estate duty.

Sect. 2, sub-s. 2, runs thus: Property passing on the death of the deceased when situate out of the United Kingdom shall be included only, if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof,

(1) [1904] A. C. 287.

H. L. (E.) or would be so payable but for the relationship of the person to whom it passes.

1909

WINANS
v.
ATTORNEY-
GENERAL.

Nov. 11, 12, 15. *Danckwerts, K.C., and Lush, K.C.* (*Willoughby Williams* with them), for the appellants. The points raised on the appeal were that the property in question was not property chargeable with estate duty; that the deceased was at the time of his death domiciled out of the United Kingdom, and therefore that the property was not liable to estate duty; that the property did not pass by the law of the United Kingdom but by the law of the deceased's domicile; that the presence in the United Kingdom at the moment of the death of the deceased of the documents of title to the property did not create a liability to estate duty; that all the debtors on the bonds and certificates were at the time of the death and all material times outside the United Kingdom and beyond its jurisdiction; that the marketability of a piece of paper in the United Kingdom was not sufficient to make the debt of which it was evidence liable to estate duty in the United Kingdom; and that the property was not situate in the United Kingdom. The reasons appear from the judgments in this House and from the report of the decision of the Court of Appeal. Reference was made (*inter alia*) to the following cases:—*Goodwin v. Roberts* (1), in which *Smith v. Weguelin* (2) was approved; *Thomson v. Advocate-General* (3); *Attorney-General v. Napier* (4); *In re Ewin* (5); *Wallace v. Attorney-General* (6); *Attorney-General v. Campbell* (7); *Bremer v. Freeman* (8); *In re Bruce* (9); *Attorney-General v. Bouwens* (10); *Attorney-General v. Jewish Colonization Association* (11); *Commissioner of Stamps v. Hope*. (12)

Sir W. S. Robson, A.-G., and Austen-Cartmell (*Sir Robert Finlay, K.C.,* with them), for the respondent. These bonds were not physically situate out of the United Kingdom. For fiscal purposes personal property has a situs, though it may have none at common law. Several sections of the Act would

(1) (1876) 1 App. Cas. 476.

(2) (1869) L. R. 8 Eq. 198.

(3) (1845) 12 Cl. & F. 1.

(4) (1851) 6 Ex. 217.

(5) (1830) 1 C. & J. 151.

(6) (1865) L. R. 1 Ch. 1.

(7) (1872) L. R. 5 H. L. 524.

(8) (1857) 10 Moo. P. C. 306, 358.

(9) (1832) 2 C. & J. 436.

(10) (1838) 4 M. & W. 171.

(11) [1901] 1 K. B. 123.

(12) [1891] A. C. 476.

be unmeaning if any other sense were attached to the word. In s. 6, sub-s. 2, and s. 8, sub-s. 3, the words are "wheresoever situate." Sect. 20, which deals with certain exemptions in favour of British possessions, speaks of "property situate in such possession." The estate duty is a tax on alienation and falls on foreigners because they enjoy the protection of British law. Sect. 2, sub-s. 2, is not wholly an exempting section, and under it foreigners may be taxed under the conditions therein stated. There is no exemption from estate duty in respect of the personal estate in England of a foreigner. The exemptions are stated in Austen-Cartmell's Finance Acts, p. 3. Sect. 2, as Lord Macnaghten said in *Earl Cowley v. Inland Revenue Commissioners* (1), is merely subsidiary and supplemental. The duty is chargeable on all property, settled or not settled, which passes on death. There is no warrant for the addition to "passes" of the words "by English law." It is not true that no legal procedure was needed to acquire possession of these bonds. They could not have been dealt with except on production of an Inland Revenue affidavit under s. 22, sub-s. 1 (*n*). The case is completely within *Attorney-General v. Bouwens* (2) and *Attorney-General v. Glendining*. (3)

H. L. (E.)

1909

WINANS

v.
ATTORNEY-
GENERAL.

Danckwerts, K.C., in reply. The word "situate" must mean situate in the eye of the law. Any other interpretation would lead to extraordinary results. The bank notes in the purse of a foreigner on a visit to this country and dying in a London hotel, or his temporary account in an English bank for travelling expenses, would be liable to estate duty.

The House took time for consideration.

Dec. 7. LORD LOREBURN L.C. My Lords, the only question in this case is whether or not estate duty is payable on certain personal property locally situated within the United Kingdom, which belonged at the time of his death to the late Mr. Winans, who died in 1897, in London, being an American citizen domiciled in America.

(1) [1899] A. C. 198.

(2) 4 M. & W. 171.

(3) (1904) 92 L. T. 87.

H. L. (E.)
 1909
 ~~~~~  
 WINANS  
 v.  
 ATTORNEY-  
 GENERAL.  
 ———  
 Lord Loreburn  
 L.C.  
 ———

It is clear that the language of s. 1 of the Finance Act, 1894, is wide enough to cover the present case, and that the Act does not contain any exception which would withdraw the property in question from the incidence of estate duty. The only suggestion which can be made in support of this appeal is that the wide language of the 1st section must be cut down by a limitation similar to the limitation which was long ago applied to other and wholly different language used in the Acts imposing legacy and succession duties.

It seems to me that there is not the smallest foundation for this view. Legacy and succession duties fall upon the benefits received by survivors on their accession upon a death. Estate duty falls upon the property passing upon a death, apart from its destination.

The Act of 1894 is in that respect analogous not to the Legacy and Succession Duty Acts, but to the old Probate Duty Acts, which it supersedes in so far as they cover common ground. No doubt the estate duty covers more than did the probate duty. Also it is possible, though no such instance has been established in regard to personal property, that the probate duty may in some point extend beyond the ambit of the estate duty. But in the main the class of property once liable to the one duty is now liable to the other, and both proceed, not upon any assessment of benefit arising upon the death to this or that particular person, but upon the value of the property which passed upon the death of the deceased.

Accordingly the principle broadly true, that domicile governs the liability to legacy and succession duties, has, as to personality within the jurisdiction, no concern with the estate duty as it had no concern with the probate duties. It would indeed be strange if, as must be the case were the appellants' argument sound, the sum of 10,000*l.* in Consols had to pay the high estate duty when belonging to an Englishman domiciled in England, and only the lower probate duty when belonging to a foreigner domiciled abroad. In both cases the property received the full protection of British laws—which is a constant basis of taxation—and can only be transferred from the deceased to other persons by the authority of a British Court.

My Lords, this appeal will have served a useful purpose, because the arguments in support of and in resistance to the proposition of law advanced by the appellants traversed a wide field; and the following opinions of your Lordships, which I have had an opportunity of reading in print, will throw a valuable light upon the structure and meaning of the Act of 1894. But the appeal itself is quite hopeless to my mind. It proposes to restrict the plain words of a taxing Act by a limitation which has no ground either in authority or in reason. I therefore move your Lordships that the appeal be dismissed with costs.

H. L. (E.)

1909

WINANS

v.  
ATTORNEY-  
GENERAL.Lord Loreburn  
J.C.

LORD ATKINSON. My Lords, one William Louis Winans, an American gentleman held to be domiciled in that country, died in England on June 22, 1897, having here at the time of his death certain bonds of the value of 1,573,962*l.* 10*s.* 11*d.* or thereabouts. His executors paid estate duty on their value, and in this suit claim a return of the duty paid, on the ground that these assets of the deceased are not chargeable with estate duty. The sole question for decision is whether they are chargeable or not. It is not disputed that the bonds are payable to bearer, are marketable in England, are not registered in the name of the deceased, nor is his name mentioned in them, are transferable in England by delivery, and that no act other than delivery need be done in or out of England to complete the title of the transferee.

Being physically situated in England at the time of their owner's death, they were subject to English law and the jurisdiction of English Courts, and taxes might therefore *prima facie* be leviable upon them. The property in them undoubtedly passed out of the deceased at the moment of his death. To whom it passed, who is to succeed to it, or who is to enjoy it, are matters to which the 1st section of the Finance Act of 1894 is not directed. There does not appear, *a priori*, to be anything contrary to the principles of international law, or hurtful to the polity of nations, in a State's taxing property physically situated within its borders, wherever its owner may have been domiciled at the time of his death. That principle is not, however, acted

H. L. (E.) upon in the case of legacy and succession duties, wide as is the language of the statutes imposing them. In these cases the principle of *mobilia sequuntur personam* is applied. In *Attorney-General v. Campbell* (1) Lord Westbury expresses himself thus :  
 1909  
 WINANS  
 v.  
 ATTORNEY-GENERAL.  
 Lord Atkinson. “ If a man dies domiciled abroad possessed of personal property, the question whether he has died testate or intestate, and also all questions relating to the distribution and administration of his personal estate belong to the judge of his domicile, and that on the principle of *mobilia sequuntur personam*. His domicile sets up the forum of administration.” And accordingly legacy duty is not payable on a legacy of personal property situated within the realm left by the will of a testator domiciled abroad—*Thomson v. Advocate-General* (2)—while legacy duty is payable on a legacy of personal property situated abroad left by the will of a person domiciled in this country: *In re Ewin* (3); *Attorney-General v. Napier*. (4) It is the same in the case of succession duty: *Wallace v. Attorney-General*. (5) In each case the same principle brings constructively the property within or carries it without the reach of the taxing statutes of this realm, according as the domicile of its deceased owner is without or within the realm. A special reason, however, is assigned for this. Legacy and succession duty are taxes on the enjoyment of and succession to property. The Acts imposing them operate upon and have regard to the persons to whom, on the death of the deceased owner, the property belonging to him is carried, on whom it devolves, who are thenceforth entitled to enjoy it. The principle upon which and the persons to whom the property of a deceased person devolves according to the law of a foreign country may be altogether different from the principles of English law applicable to the same subjects, and to avoid the great difficulties which would result from any attempt on the part of the English Courts to follow the devolution of property under a system of foreign law of which they are ignorant, and exact duties from beneficiaries who might, under the foreign law, be altogether different persons from those who would be entitled

(1) L. R. 5 H. L. 524, at p. 529.

(2) 12 Cl. &amp; F. 1.

(3) 1 C. &amp; J. 151.

(4) 6 Ex. 217.

(5) L. R. 1 Ch. 1.

beneficially under English law, the principle of *mobilia sequuntur personam* has been applied. In *Thomson v. Advocate-General* (1) Lord Campbell is reported to have expressed himself thus: "The truth is, my Lords, that the doctrine of domicil has sprung up in this country very recently, and that neither the Legislature nor the judges, until within a few years ago, thought much of it, but it is a very convenient doctrine, it is well understood, and I think it solves the difficulty with which this case was surrounded"; and again, "This seems to be the most reasonable construction to be put upon the Act of Parliament, it is the most convenient, any other construction would lead to very great difficulties."

H. L. (E.)

1909

WINANS

v.

ATTORNEY-  
GENERAL.

Lord Atkinson.

Both the Lord Chancellor and Lord Campbell point out that this doctrine has no application to probate duties.

In *Wallace v. Attorney-General* (2) Lord Cranworth, in speaking of s. 2 of the Succession Duty Act, is reported to have spoken thus: "The question, therefore, is whether, when a person domiciled abroad makes a will giving personal property in this country by way of legacy, the legatee is a person 'becoming entitled' to that property within the true intent and meaning of s. 2. I think not. I think that, in order to be brought within that section, he must be a person who becomes entitled by virtue of the laws of this country. Any wider construction would give rise to difficulties hardly to be surmounted. In collecting duties the officers of the revenue will, in general, find no difficulty, supposing the duties to be imposed only on persons entitled under our own laws. The officers know, or must be supposed to know, what these laws are with regard to the persons liable by our laws to the duties to be levied. But who the parties entitled under a foreign will are is a question which no knowledge of our laws will enable them to solve. It can only be ascertained by evidence in every case shewing what the foreign law is, and who is entitled under it. In some cases this may admit of little or no doubt, but in others it may be a matter of great difficulty. And in no case can the officers safely act until the rights of the parties have been ascertained litigiously. But even when it is ascertained who the parties entitled are, it by no means follows

(1) 12 Cl. &amp; F. 1, at p. 28.

(2) L. R. 1 Ch. 1, at p. 7.



H. L. (E.) that the amount of duty payable would be known." And he  
 1909 then proceeds (1) to give an example of this latter. It would  
 WINANS therefore appear that the application of the principle of  
 v. mobilia sequuntur personam in the case of legacy and succession  
 ATTORNEY- duties is based upon convenience. It springs from the necessity  
 GENERAL. of avoiding the difficulties, almost insurmountable, which would  
 Lord Atkinson. arise in exacting these duties on any other principle, but it is  
 obvious that no more difficulties can arise in exacting the  
 estate duty than arise in exacting probate duties. Both  
 duties are required to be paid by the executor before probate is  
 granted to him, and in neither case are the officers of the revenue  
 concerned with the ultimate devolution of the property, or with  
 the fact that in the ultimate adjustment of the estate each  
 beneficiary may have to pay some duty on the benefit he  
 receives.

The Finance Act of 1894, like the Victorian statute considered  
 in the case of *Blackwood v. The Queen* (2), imposes a "tax pay-  
 able by an executor as a condition precedent to the issue and  
 efficacy of the probate necessary for his action, out of the estate  
 while it is in bulk, and before distribution or administration has  
 commenced." The argument from convenience has, therefore,  
 no application to duties of this kind, exacted at such a time and  
 under such conditions, and it would certainly appear to me that  
 if the last three lines of s. 1 of the Act of 1894 were omitted, and  
 the remainder of the section considered alone, its general words  
 should be held to apply to all property within the realm, whatever  
 might be the domicile of the person on whose death the property  
 passes. The fact that the special provisions of s. 2, sub-s. 2,  
 of the Act were needed to bring under charge to these duties  
 property situate outside the realm, which under the previous  
 state of the law would have been liable to legacy and succession  
 duty, is, I think, almost conclusive to shew that the principle of  
 mobilia sequuntur personam does not apply to estate duty. If  
 it did, the special provision of s. 2, sub-s. 2, would have been  
 entirely unnecessary. The principle would have effected all that  
 the express provision of the sub-section effects. And it is scarcely  
 conceivable that when the Legislature expressly applied that

(1) L. R. 1 Ch. 1, at p. 8.

(2) (1882) 8 App. Cas. 82, 97.



principle in order to bring constructively within this realm the personal property situate abroad of a person domiciled here, and so within the reach of the statute of 1894, it would not also have applied expressly the same principle to remove constructively the property situated here to the foreign domicile of its owner so as to escape estate duty if it was intended that the property should escape those duties. Prima facie, therefore, estate duty would be payable in respect of assets upon which probate duty would formerly have been payable, and under the special provisions of s. 2, sub-s. 2, estate duty would also be payable upon the assets mentioned therein upon which legacy and succession duty would formerly have been payable. Domicil has nothing to do with probate duties—*New York Breweries v. Attorney-General* (1)—and, unless in the case of property situate within this realm brought within some of the exceptions provided for in the Act of 1894, it has nothing to do with estate duties. It may well be that by special legislation the situs of certain kinds of property is for the purpose of the probate duty deemed to be where it was not theretofore considered to be, or where in fact it is not. Mr. Danckwerts referred your Lordships to two statutes of that character, 25 & 26 Vict. c. 22 and 27 & 28 Vict. c. 56. By s. 39 of the first, specialty debts are placed in the same position as simple contract debts, their situs being thus fixed not at the place where the instrument creating them may happen to be, but at the place at which the debtor died; and by s. 4 of the second, British ships are, for the same purpose, deemed to be at the time of the owner's death at the port at which they are registered, though in fact they may be elsewhere. That, however, does not help much the appellants' argument in this case. Probate duty would before the passing of the Finance Act in 1894 have undoubtedly been payable in respect of these bonds upon which the estate duty sought to be recovered has been in fact paid: *Attorney-General v. Bouwens* (2); *Stern v. The Queen*. (3)

If, therefore, there is nothing in the principles of international law or in the requirements of public or international convenience

H. L. (E.)

1909

WINANS

v.

ATTORNEY-  
GENERAL.

Lord Atkinson.

(1) [1899] A. C. 62.

(2) 4 M. &amp; W. 171.

(3) [1896] 1 Q. B. 211.

H. L. (E.) 1909  
WINANS  
v.  
ATTORNEY-  
GENERAL.  
Lord Atkinson.

to preclude the application of the general words of the earlier part of s. 1 of the Act of 1894 to bonds such as these, the duty upon which forms the matter of controversy in this case, as in my opinion there is not, the next question is, are there any other provisions of that statute which necessitate that the general words of the section should be so narrow as to exclude property so placed?

First, as to the last three lines of the section. What is the nature of the duties mentioned in the First Schedule which are not to be levied where estate duty is paid? First, they are the probate duties thenceforth payable on the affidavit which by s. 29 of the Act of 1881 any person applying for probate or letters of administration in England or Ireland must lodge, setting forth the estate in respect of which probate or letters of administration are required to be granted. This affidavit is thenceforth to bear a stamp indicating the duty paid, which duty is measured by the assets of the deceased over which the Probate Court has jurisdiction, namely, assets situate within England or Ireland, as the case may be. An inventory is substituted in the case of Scotland. The second paragraph of the schedule deals with the duties leviable on accounts of certain descriptions of personal and movable property of a person dying after June 1, 1881. The section refers to property of which the deceased within three months before his death (extended by the Act of 1889 to twelve months) disposed by some voluntary disposition or alienation, by reason of which it escaped probate duty. The duties are imposed on these accounts at the same rates as they are imposed on the affidavits and inventories required to be lodged for probate, and the object of the section apparently is to tax the property alienated by these semi-testamentary dispositions as if it had been disposed of by will, or the deceased had died intestate in respect of it—an object analogous to that which s. 3 of the Act of 1894 is designed to effect. The interest of a successor in the property included in this account, or in leaseholds passing to him by will or devolution of law, is not made liable to the additional succession duty imposed by the statute mentioned in the next paragraph of the schedule, namely, the 21st section of the Inland Revenue Act of 1888.

The next paragraph deals with the temporary estate duty payable on the property included in the affidavit or inventory lodged for probate or letters of administration, or on the personal or movable property included in the above-mentioned account, where the same exceeds 10,000*l.*, or where the value of any succession exceeds that sum in the case of the deceased owner dying before June 1, 1896. The fifth paragraph fully describes the duties with which it deals. Upon the fact that the several statutes in this schedule are not repealed, but that it is merely provided by s. 1 of the Act of 1894 that the duties imposed by them shall not be levied in respect of property chargeable with estate duty, an argument has been founded that the field over which the latter extends does not comprise within it, or is not coterminous with the field over which the duties mentioned in the schedule extend. Possibly that may be so; I do not think it is so; but even if it be so, that fact lends no support whatever to the contention that these bonds are removed from the operation of s. 1 of the statute, on the principle of *mobilia sequuntur personam*.

In addition, in s. 7, sub-s. 4, and s. 20, sub-s. 1, of the Act the right of foreign countries and British possessions to levy a duty upon property situate within their bounds is clearly recognized, even though that property should, by reason of the provisions of s. 2, sub-s. 2, of the Act of 1894, be liable to estate duty in this country; and, lastly, s. 6, sub-s. 2, of that Act expressly provides that the executor of the deceased shall pay the estate duty in respect of all personal property, wheresoever situated, of which the deceased was at the time of his death competent to dispose, on delivering the Inland Revenue affidavit. The Inland Revenue affidavit is, according to the definition in s. 22, sub-s. 1 (*n*), the affidavit made under the statute mentioned in the Second Schedule, the affidavit to lead to a grant of probate.

By sub-s. 7 of the same section the duty which is to be collected on this affidavit is due on the delivery of the affidavit. It is fixed and due, therefore, while the estate is in bulk, not only before it has been actually administered, but before the executor has even acquired the right to take possession of it or interfere with it; before, too, its ultimate destination to the persons who are to succeed to it or any part of it, or by whom it or any

H. L. (E.)

1909

WINANS

v.

ATTORNEY-  
GENERAL.

Lord Atkinson.

H. L. (E.) part of it is to be enjoyed, has to be considered. For all these  
 1909 reasons I am clearly of opinion that estate duty was rightly  
 WINANS exacted on the estimated value of these bonds, and that this  
 ? appeal must fail.

ATTORNEY-  
 GENERAL.

Lord Atkinson.

Mr. Danckwerts strongly contended, as I understood, that under the provisions of s. 2, sub-s. 1, some of those kinds of property which are to be deemed to pass at the death of the deceased but do not in fact pass would not be liable to estate duty, even though situated within this realm, when the persons on whose death they were to be deemed to pass had a foreign domicile. He failed to convince me that he was right in this; but if he were right, it would by no means follow that bonds situate as these bonds are, the property in which clearly passes at the death of the deceased owner, and in respect to which it is not necessary to resort to s. 2, sub-s. 1, at all, would not be liable to the estate duty. This appeal should, I think, therefore be dismissed with costs.

LORD GORELL. My Lords, the appellants could hardly dispute that the duties in respect of probate imposed by the Customs and Inland Revenue Act, 1881, would have been payable upon the value of the bonds if the Act of 1894 is not applicable, and if their present contention involves any such point, it is, in my opinion, to be decided against them in accordance with the case of *Attorney-General v. Bouvens* (1), where it was laid down that probate duty is payable in respect of bonds of foreign Governments of which a testator dying in this country was the holder at the time of his death, and which have come to the hands of the executors in this country, such bonds being marketable securities within this kingdom, saleable and transferable by delivery only, and it not being necessary to do any act out of this kingdom to render the transfer of them valid. It was considered clear that the Ordinary (now the Probate Division of the High Court) could administer all chattels within his jurisdiction, and if an instrument was created of a chattel nature capable of being transferred by acts done here and sold for money here, there was no reason why the Ordinary or his

(1) 4 M. & W. 171.



appointee should not administer that species of property ; that such an instrument was in effect a saleable chattel, and followed the nature of other chattels as to the jurisdiction to grant probate. That case was decided after full argument by very eminent counsel and consideration by a strong Court, presided over by Lord Abinger, who delivered the judgment of the Court, and has been acted on ever since. It was followed in *Stern v. The Queen* (1), where the late Wright J. states the position with great clearness, and there appears to be no reason for differing from it now.

H. L. (E.)

1909

WINANS

v.

ATTORNEY  
GENERAL.

Lord Gorell.

The point urged by the appellants was that principles similar to those applied to the duties on legacies and successions to personal estates should be applied in this case. These principles are very fully discussed and the cases based upon them given in Williams' Law of Executors and Administrators, 10th ed. pp. 1846—1853. It may be stated generally, and without examining exceptions, and the difference in rules applicable to succession duty on testamentary appointments under English instruments, that if a British born subject or a foreigner dies domiciled out of England the whole of his personal estate wherever situate at the time of his death is to be regarded as situate in the country of domicile, and therefore exempt from these duties, and that if such a person dies domiciled here all his personal assets, wherever situate, are liable thereto.

This is based upon the general principle that personal property follows the person and is to be considered as situate wherever the domicile of the proprietor is. Accordingly the wide terms of the Legacy and Succession Duty Acts have received a limited interpretation, as, for instance, in the case of *Arnold v. Arnold* (2), where Lord Cottenham, referring to the statute 36 Geo. 3, c. 52, observed that when the Act speaks of "any will of any person," and of the legacies being payable out of the personal estate, it must be considered as speaking of persons and wills and personal estates in this country, that being the limits of the sphere of enactment.

The personal property is distributed according to the law of the domicile, and those who are benefited receive their benefits

(1) [1896] 1 Q. B. 211.

(2) (1836) 2 My. &amp; Cr. 256.



H. L. (E.)  
 1909  
 WINANS  
 v.  
 ATTORNEY-  
 GENERAL.  
 Lord Gorell.

according to that law. The duties imposed by these statutes in the case of a person dying domiciled in this country are in substance charged against the persons taking the benefits, and the duties vary with the persons benefited.

These Acts and the principles applicable to their construction do not appear to me to assist in the construction of an Act which does not deal with the accession to the property of a deceased person, but with what has to be done and paid before the property can be reached and dealt with. A short review of the more important legislation before 1894 will make the position plain, and it will be sufficient for present purposes to deal only with England.

When the Act of 1894 was passed there were five death duties in existence in England—probate duty, account duty, temporary estate duty (which was imposed for a period of seven years expiring in 1896), legacy duty, and succession duty.

It is unnecessary to refer to the early Acts as to probate duty. In 1815 was passed the Act 55 Geo. 3, c. 184, imposing an ad valorem stamp duty, which was one-half greater on letters of administration than upon the granting of probate. In 1880, by the Customs and Inland Revenue Act (43 Vict. c. 14), the rates for both were made uniform, and in 1881 the Customs and Inland Revenue Act of that year (44 Vict. c. 12, s. 27) exempted personal estates under 100*l.* in value from payment of probate duty and required the stamp to be placed on the affidavit of value instead of on the grant itself.

The duty was payable on such part of the assets only as the executors or administrators could recover by virtue of the probate or letters of administration. It was not payable in respect of property which was not situate within the jurisdiction of the Court of Probate. The ad valorem duty was accordingly fixed in the schedule to the statute of 1815 and continued afterwards as on the value of the estate and effects for or in respect of which the probate or letters of administration were granted, and the Courts were not to grant probate or letters of administration without an affidavit that the “estate and effects of the deceased for or in respect of which the probate or letters of administration is or are to be granted . . .” were under the

value of a certain sum to be therein specified. The Act of 1880 required an account of the particulars of the personal estate for or in respect of which probate or letters of administration is or are to be granted and of the estimated value of such particulars to be delivered with the affidavit.

Account duty was imposed by s. 38 of the Act of 1881, amended by s. 11 of the Customs and Inland Revenue Act, 1889 (52 Vict. c. 7). This was a stamp duty intended more particularly to cover certain personal and movable property (not covered by probate duty) disposed of during the lifetime of a deceased person, which, if it had passed on death, would have been liable to probate duty.

Temporary estate duty was a duty of 1 per cent. imposed by the above-mentioned Act of 1889 upon estates exceeding 10,000*l.* and was charged on both realty and personalty; and according to s. 7 of the Act was not to be payable where the death took place after June 1, 1896.

The other two duties are the legacy duty and the succession duty.

The former depends upon the statutes 36 George 3, c. 52, 55 Geo. 3, c. 184, 43 Vict. c. 14, and 44 & 45 Vict. c. 12; the latter upon the Succession Duty Act, 1853 (16 and 17 Vict. c. 51), as amended by other Acts, whereby certain dispositions and property not touched by the Legacy Duty Acts were made subject to duty.

The first three duties are in effect superseded by the Act of 1894 in the case of persons dying after August 1, 1894. The legacy duty is left very much where it was, and the succession duty has been altered (see especially s. 18 of the Act), but the amendments made with respect to these two duties do not, in my opinion, require to be examined minutely for the purposes of this case.

The broad point with regard to the duties is that the first three dealt with the duty on the amount of property passing, whatever its destination, while the other two dealt with the duty on the value of the interests taken, and the duty varied with the relationship of the person taking to the person from whom the interest was derived or the predecessor.

H. L. (E.)

1909

WINANS

v.

ATTORNEY-  
GENERAL.

Lord Gorell.

H. L. (E.)  
1909  
WINANS  
v.  
ATTORNEY-  
GENERAL.  
Lord Gorell.

The 1st section of the Act of 1894 provides that "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person, a duty, called 'estate duty,' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the First Schedule to this Act shall not be levied in respect of property chargeable with such estate duty."

Now what were the existing duties mentioned in the said First Schedule for which the new duty is substituted? Paragraph 1 of the schedule mentions the stamp duties imposed by the aforesaid Act of 1881. The second paragraph refers to stamp duties, at the like rates with those last mentioned, which were imposed by s. 38 of the Act of 1881, as amended by s. 11 of the Act of 1889, that is to say, to the aforesaid account duty.

It may here be noticed that s. 41 of the Act of 1881 provided for the cesser of legacy and succession duty at the rate of 1*l.* per cent. imposed by 55 Geo. 3, c. 184, and the Succession Duty Act of 1853, where the duty according to the value had been paid on the affidavit account.

The third paragraph refers to a charge imposed by the Customs and Inland Revenue Act, 1888, s. 21, in respect of succession duty additional to that charged by s. 10 of the Succession Duty Act, 1853, of 10*s.* per cent. upon the value of the interest of the successor, where he is the lineal issue or lineal ancestor of the predecessor, and 1*l.* 10*s.* per cent. on the value of the interest of the successor in all other cases mentioned in such section. But the additional duty is not payable upon the interest of a successor in leaseholds passing to him by will or devolution by law, or in property included in an account according to the value whereof duty is payable under the Act of 1881.

The fourth duties referred to are temporary estate duties above mentioned; they are in addition to those imposed on the affidavit and account by the Act of 1881.

The fifth duty mentioned in the schedule is the duty at the rate of 1*l.* per cent. which would by the Acts in force relating to

legacy and succession duty have been payable under the will or intestacy of the deceased, or under his disposition or any devolution from him under which respectively estate duty has been paid, or under any other disposition under which estate duty has been paid.

I have referred somewhat fully to these duties existing at the time of the passing of the Act of 1894 in order to see whether that Act, by not repealing the provisions relating to these duties and substituting the estate duty granted by it in respect of property chargeable with such duty, has produced an inconsistency which would lead to the conclusion that the Act is not applicable to the present case, and I fail to see that any such conclusion can be arrived at. Convenience may have dictated the form in which the statute is framed: it is difficult, if not impossible, to suggest any case in which with regard to persons dying after the commencement of the Act of 1894 the new duty is not substituted for the old probate duties; and certainly no sufficient reason was given why the substitution should not apply in the present case unless there is something in the sections which makes it inapplicable.

Then do the sections of the Act lead to any different conclusion?

The 1st section in its terms applies to the present case unless those terms are to be read in the limited manner suggested by the appellants. The generality of the section is limited by the words "save as hereinafter expressly provided," and a perusal of the subsequent express provisions does not assist in shewing that the present case should be excluded from the burden of the estate duty.

If Mr. Winans had died before the passing of the Act, his executors would undoubtedly have had to take out probate in respect of his personal estate situate in this country, and pay the probate duties which were then charged by the State when authorizing the executors to act. They could not without the probate have acquired possession of and the title to his personal assets in this country.

The death having taken place after the expiration of August 1, 1894, when the first part of the Act came into operation, the

H. L. (E.)

1909

WINANS

v.

ATTORNEY-  
GENERAL.

Lord Gorell.



H. L. (E.) case falls within the language used in the said 1st section  
 1909 subject to the limitations and provisions of the Act. What is  
 WINANS there to shew that the section is not to apply to the case of a  
 " foreigner domiciled abroad so far as his property is situate in  
 ATTORNEY- this country? I cannot find anything, nor is there anything  
 GENERAL. unreasonable in the application of the Act thus far.  
 Lord Gorell.

The executors cannot without the authority of the Probate Court, acting for the State, obtain possession of and title to the personal assets in this country. According to s. 6, sub-s. 1, the estate duty is to be a stamp duty collected and recovered as therein mentioned. Sub-s. 2 provides that "the executor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death on delivering the Inland Revenue affidavit"—that is, the affidavit to lead to a grant: see definition, s. 22, sub-s. 1 (n)—"and may pay, in like manner, the estate duty in respect of any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment."

Sub-s. 7 provides that "the duty which is to be collected upon an Inland Revenue affidavit or account shall be due on the delivery thereof, or on the expiration of six months from the death, whichever shall first happen."

Under the Act, therefore, the appellants were bound to pay the estate duty in order to get possession of the bonds in question.

"The" estate duty in this case was on the property in this country; for, although all his property passed on the death of the deceased, s. 2, sub-s. 2, operated. Under that sub-section "Property passing on the death of the deceased, when situate out of the United Kingdom, shall be included only if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes."

This provision adequately protects the representatives of a person dying domiciled abroad, for under the decisions already

referred to the property of such person, when situated out of the United Kingdom, would not be liable to legacy and succession duty (I am not here including the cases of succession duty on testamentary appointments under English instruments). It may be noticed that it is equally clear that the effect of the Act of 1894 is to make all the property, wherever situate, of a person dying domiciled in this country, in respect of which legacy and succession duty is payable, liable to estate duty, although before the Act it would not have been liable to probate duty, except so far as it was situate in this country.

Sect. 8 is of considerable importance. It is a long section, and I therefore do not state its terms, but would refer especially to sub-ss. 1 and 3, the latter of which obliges the executor to specify to the best of his knowledge and belief in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which estate duty is payable upon the death of the deceased, and makes the executor accountable for the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death, but not liable for any duty in excess of the assets which he has received as executor, or might but for his own neglect and default have received.

It seems to me to be unnecessary to refer to the other sections of the Act which fortify the views I have been endeavouring to express. It is sufficient for present purposes to say of cases where property is left by will or under an intestacy by a person dying after the commencement of the first part of the Act that the scheme of the Act, based upon the general principle that statutes of this country may affect citizens thereof and persons temporarily resident here, and property situate here, although belonging to persons abroad, appears to be that the State should take toll where it can properly do so on such property passing on the death of such person independently of the destination of the property, that it should take such toll on the property found in this country to whomsoever it belongs, and that it should take toll even over the property outside the country, if the deceased is domiciled in this country, where such property is liable to legacy and succession duty.

H. L. (E.)

1909

WINANS

v.

ATTORNEY-  
GENERAL.

Lord Gorell.

H. L. (E.)  
 1909  
 WINANS  
 v.  
 ATTORNEY-  
 GENERAL.  
 Lord Gorell.

The result is that to succeed in this case the appellants must make out that the property in question was not situate in this country, and this, having regard to the nature of the bonds, they fail to do.

My Lords, I have examined at some length the statutes and principles which required consideration, for the amount involved is large, and the case is of a kind which may no doubt commonly occur, but after doing so I feel no difficulty, notwithstanding the arguments which were strongly pressed by counsel for the appellants, in coming to the conclusion that the case is free from real doubt, and that no substantial ground has been shewn for interfering with the decision of the Court of Appeal.

The appeal should, in my judgment, be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, it is admitted that the property in question here was at the time of Mr. Winans' death physically situated in England. The question is whether estate duty falls to be levied and paid upon that property under the Finance Act, 1894. Sect. 1 of that Act is as follows: "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided, of all property, real or personal, settled or not settled, which passes on the death of such person, a duty, called 'estate duty,' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the First Schedule to this Act shall not be levied in respect of property chargeable with such estate duty."

The Act accordingly starts with language of comprehensive generality. The duty has to be levied on all property passing on the death of every person dying after the commencement of that part of the Act. The generality is limited by the words "save as hereinafter expressly provided." As is shewn with such care in Mr. Austen-Cartmell's treatise on the Finance Acts, p. 3, the exceptions are numerous—no fewer than nineteen in number. It may be, my Lords, that according to rules of comity acknowledged among nations there may be further exceptions, but upon that point it is in this case not necessary to form any opinion.

The case before your Lordships' House is within clear and definite limits ; it has reference admittedly to personal property alone, and to such property alone which at the date of the testator's death was locally situated within the bounds of the United Kingdom. The third admission, which was candidly made in the able and exhaustive argument of Mr. Danckwerts for the appellants, was that such property would have been liable to probate duty prior to the Finance Act, 1894.

It was maintained, however, that quoad property of the above character probate duty was still and was alone exigible, and that estate duty was not exigible. An appeal was made in particular by both parties to s. 2, sub-s. 2, of the Act. That sub-section is in the following terms : "Property passing on the death of the deceased, when situate out of the United Kingdom, shall be included only if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes."

• My Lords, in my opinion it cannot be successfully maintained that the bearer bonds in this case fall within that category. It is quite true that they would not have been liable to legacy or succession duty. These duties, my Lords, are duties upon the accession to property by legatees and successors, and the levy of them is, in my opinion, an incident of such accession, meant to have been governed under the law of the domicile of the deceased which regulates the distribution of his personal estate. Estate duty is of a different character ; the levy and payment thereof occur not at the point of accession to property, but of the passing of property by the death of a testator. The statute provides for graduation of rate according to the magnitude of the estate thus passing at death. In the case of an English citizen all his property "wheresoever situate," subject to the exception in the Act, is aggregated, and into that aggregation—to confine oneself to the matter in hand—all personal property situate out of the United Kingdom must come, unless legacy or succession duty would not have been payable in respect thereof. In the case of the foreign citizen no taxation, of course, falls, except upon property situate within the United Kingdom,

H. L. (E.)

1909

WINANS

v.

ATTORNEY-  
GENERAL.Lord Shaw of  
Dunfermline,



H. L. (E.)

1909

WINANS

r.

ATTORNEY-  
GENERAL.Lord Shaw of  
Dunfermline.

and I know no reason either under the law of nations, by the custom of nations, or in the nature of things why property within the jurisdiction of this country, possessed and held under the protection of its laws, should not, upon transfer from the dead to the living, pay the same toll which would have been paid by property enjoying the same protection but owned by a deceased British subject.

In the second place, while it is thus seen that estate duty is not at the point or in the ratio of its incidence analogous to legacy or succession duty, it humbly appears to me to be almost entirely analogous in those respects to the probate duty which would by admission have fallen to be levied upon the bearer bonds in question.

My Lords, I think in substance that probate duty is not, and estate duty is, leviable for the simple reason that (and I again expressly confine myself to the kind of property here dealt with, and do not think it necessary to make a more exhaustive pronouncement) estate duty has absorbed probate duty. I think this to be the sound construction of s. 1. The whole scheme of the Act appears to me to make this perfectly plain. Sect. 6, sub-s. 1, declares that "estate duty shall be a stamp duty, collected and recovered as hereinafter mentioned." By s. 6, sub-s. 2, "the executor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death, on delivering the Inland Revenue affidavit."

My Lords, it appears to me to be clear that on the occasion of delivering this affidavit it was the duty of the Inland Revenue to see to it that estate duty was paid, and I think they would have been failing in their duty by omitting to ingather in terms of an obligation for payment imperatively and expressly laid.

When, my Lords, is the occasion? It is on delivering the affidavit. By s. 22, sub-s. 1 (n), "Inland Revenue affidavit means an affidavit made under the enactments specified in the Second Schedule," and the Second Schedule embraces s. 29 of the Customs and Inland Revenue Act, 1881, which provides for the affidavit to be required or received from any person applying for probate

or letters of administration. The argument for the appellants was that probate was simply a condition imposed by law upon the obtaining of a title to administer. That may quite well be; but the payment of estate duty not the less appears to me to be now set up not only on a similar occasion, but even as a similar condition. In the instance under consideration, the appellants in this case by their affidavit for Inland Revenue, dated August 31, 1897, state "We desire to obtain the probate of the will of the above named William Louis Winans."

H. L. (E.)

1909

WINANS

v.

ATTORNEY-  
GENERAL.Lord Shaw of  
Dunfermline.

This is exactly what would have had to be done prior to the law of 1894 if the probate duty had alone been exigible, and as s. 6, sub-s. 2, states that the executor "shall pay the estate duty . . . on delivering the Inland Revenue affidavit," it appears to me, my Lords, that something closer than the analogy to the probate duty has been reached, namely, that payment of the estate duty is made a peremptory condition of probate. I may add that I think this conclusion is confirmed by subsequent portions of the Finance Act, and in particular by the elaborate provisions of s. 8.

I respectfully agree with the result of the judgment in the Court of Appeal.

*Order of the Court of Appeal affirmed and appeal dismissed with costs.*

*Lords' Journals, December 7, 1909.*

Solicitors: *E. H. Quicke, for H. Montague Williams, Brighton;*  
*Sir Francis Gore, Solicitor of Inland Revenue.*



## [HOUSE OF LORDS.]

H. L. (E.) ATTORNEY-GENERAL . . . . . APPELLANT ;  
 1909 . . . . . AND  
 Dec. 8. TILL . . . . . RESPONDENT.

*Revenue—Property and Income Tax—Return of Profits under Sched. D—  
 “Deliver statement as aforesaid”—Neglect to deliver “a true and correct  
 statement”—Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 52, 55.*

The respondent, being required by s. 52 of the Income Tax Act, 1842, to deliver “a true and correct statement in writing” of his gains and profits under Sched. D., delivered an incorrect statement, not fraudulently, but (as the jury found) negligently, that is to say, not to the best of his judgment and belief according to the rules :—

*Held*, that the penalty imposed by s. 55 of the same Act for neglecting “to deliver any statement as aforesaid” is not limited to a case of non-delivery, but is applicable also to the present case.

Decision of the Court of Appeal, [1909] 1 K. B. 694, reversed and decision of Lord Alverstone C.J. restored.

THE facts material to this appeal are stated in the judgment of Lord Gorell and in the report of the decisions below.

Nov. 15, 16. *Sir S. T. Evans, S.-G.*, and *W. Finlay*, for the appellant. The question turns upon the construction of ss. 52 and 55 of the Income Tax Act, 1842. The language is sufficiently clear. By s. 52 every person chargeable is to deliver a “true and correct statement” of profits and gains. By s. 55 any person “who ought to deliver any list, declaration, or statement as aforesaid”—the last two words obviously referring to s. 52—shall be liable to the penalty. There is no ground for confining the imposition of the penalty to cases of non-delivery. The case of non-delivery is dealt with in s. 56, where a person on whom no notice has been served, and who on inquiry is found to be exempted from “all and every the duties hereby granted,” is not to be liable to the penalty : see *Attorney-General v. Alexander*. (1) The case falls exactly under *Lord Advocate v. Sawers* (2) and under the title of *Lord Advocate v. A. B.* (3) The penalties are

(1) (1874) L. R. 10 Ex. 20.

(2) (1897) 35 Sc. L. R. 190.

(3) (1897) 3 Tax Cases, 617.

not heavier in this than in other parts of the Act. [They cited the sections which are fully discussed in the judgments of Lords Gorell and Shaw of Dunfermline and referred to *Speyer v. Inland Revenue Commissioners*. (1)]

H. L. (E)  
1909  
ATTORNEY-  
GENERAL  
v.  
TILL.

*The Respondent* in person. The Crown has not proved an offence under s. 55. That section does not apply to a case where a statement has been delivered. It is confined to refusal or neglect to deliver. The words "any statement" would have been "such statement" if reference had been intended to the words of s. 52. It is impossible on any true canon of grammar to incorporate the words "true and correct" from s. 52. The section is penal in character, and the Crown must prove strictly in the affirmative that the offence has been committed. In previous Acts the words are "shall deliver a statement or statements," as in s. 66 of the Act of 1806. The words "true and correct" do not appear in any of the Acts before 1842. In all the Acts the penalty is for refusing information to officers of the department and was never imposed for error, negligence, or even fraud in the statement. This goes to prove that s. 55 is addressed to non-delivery only; and see ss. 68, 86, 127, 162. In all cases it is either non-delivery or fraud or evasion only which is punished; never mere inaccuracy. On the respondent's construction the Act is made reasonable and consistent; on that of the Crown it becomes harsh, unreasonable, and inconsistent, as ample remedies are provided for revision and correction by the officials of the revenue.

*W. Finlay* in reply.

The House took time for consideration.

Dec. 8. LORD LOREBURN L.C. My Lords, I hold that this appeal should be allowed, and, in view of the exhaustive criticisms to which your Lordships have subjected these somewhat obscure sections, I will only say a few words.

I attach great importance to the rule that unless penalties are imposed in clear terms they are not enforceable. Also, where various interpretations of a section are admissible, it is a

(1) [1908] A. C. 92.



H. L. (E.) strong reason against adopting a particular interpretation if it shall appear that the result would be unreasonable or oppressive.

1909

ATTORNEY-  
GENERAL

v.

TILL.

Lord Loreburn  
L.C.

After listening attentively to the argument and considering the 55th section, both by itself and in connection with other parts of this and other Acts to which we were referred, I have come to the conclusion that neither canon is violated by the contention of the Crown. When the 55th section enacts "that if any person who ought by this Act to deliver any list, declaration or statement as aforesaid, shall refuse or neglect so to do within the time limited in such notice" he shall be liable to a penalty, surely it means that he must either be liable to the penalty or must do what, by the Act, he ought to do as to the delivery of the list, declaration, or statement. What he ought to do is described in the preceding sections, and among them is s. 52, which requires him to deliver "a true and correct statement in writing." If he does not deliver a true and correct statement, or if he does not deliver any statement at all, he, in either case, equally fails to do what he ought to do under the Act. I confess that the distinction sought to be drawn between the use of the words "any statement" and the possible, but not adopted, use of the words "such statement" seems to me to take more account of grammar than of substance. If the latter words had been used the meaning of the section would, it is true, have been incontestable. As it is I think they do not offend against grammar and are sufficiently clear, and would have been so regarded, but for the fact that with a severe precision in the use of language the thought underlying the words might have been still more plainly expressed. My noble and learned friend Lord Gorell has adduced additional reasons from the other contents of this and from the contents of other sections fortifying this conclusion, and I will not dwell upon them. They seem to me very cogent.

Mr. Till, however, argued that upon this view a very hard penalty may fall upon a person who without any fault on his own part makes a statement incorrect even in a small particular, and he urges that it is no answer to say the Crown would never use such a power. I entirely agree with him that such an answer could not prevail. But I do not think it is true that an innocent

mistake exposes a man to these penalties. The Act appears to have been formed in full view of the conditions under which the income tax has to be collected. On the one hand hundreds of thousands, if not millions, of people are required to make returns. It is necessary, therefore, that there should be a sharp weapon available in order to prevent the requirements of the Act being trifled with. On the other hand the making of the return or statement is not always easy, and mistakes may occur notwithstanding that care may have been used to avoid them, still more when proper care has not been used. Accordingly provision is made for penalties which are to fall in the event either of unpunctuality or of inaccuracy in the return or statement required. But alongside of that are to be found provisions to relieve a man from the penalty if he mends his mistake. In the present case this result could be secured by s. 129. I see nothing either harsh or unreasonable in this. A fair balance is held, and while the revenue is protected against procrastination and carelessness which, if practised on any large scale, would make the collection of the tax an intolerable business, any one who though honest has been neglectful may redeem his neglect.

In regard to the argument that, upon this construction, the penalty for incorrectness is more heavy than are other penalties for more serious disobedience, I am not satisfied that it is so, or at all events that it is conspicuously so; but I do not pursue the subject, for I think it does not signify whether it be so or not.

I am, in a sense, sorry for Mr. Till, because he has evidently persuaded himself as well as the Court of Appeal that he has found a loophole of escape from the contention of the Crown, and he will have to pay dearly for his error. It seems to me, however, that he has been trifling with a thoroughly just claim, and cannot complain that the Crown should put in force against him, though no charge can be made or is made of any dishonesty, the penalty prescribed for exactly this kind of conduct.

LORD ATKINSON. My Lords, I have had the advantage of reading the judgment which my noble and learned friend Lord Gorell is about to deliver, and I concur in the conclusion at which he has arrived and the reasoning by which he has arrived

H. L. (E.)

1909

ATTORNEY-  
GENERALv.  
TILL.Lord Loreburn  
L.C.

H. L. (E.)  
1909  
ATTORNEY-  
GENERAL  
v.  
TILL.  
Lord Atkinson.

at it. Like him, I think that the appeal should be allowed, but I do not think the contention of the Crown, as I understand it, is well founded, namely, that any taxpayer who sent in a statement of the gains and profits earned by him in his trade or business, as required by the 52nd section of the Income Tax Act of 1842, which was erroneous in fact necessarily became liable to the penalties imposed by the 55th section of that statute. With all respect to the Court of Appeal, it would appear to me that, finding themselves confronted with this contention, they allowed themselves to be too much influenced by the quite natural repugnance which one must necessarily feel against adopting a construction of these enactments which would render the subject liable to those very heavy penalties if, while honestly endeavouring to furnish a correct statement according to his lights, he made some mistake or was guilty of some error in estimating what his gains and profits amounted to.

I do not think that the provisions of the statute are so unjust and oppressive as that. It is only necessary to read the last six lines of the first part or paragraph of the 52nd section to see that the amount of the gains and profits to be stated is an estimated amount, and the estimate is to be made for the period and according to the rules contained in the respective schedules to the Act. Many persons might find a difficulty in applying those rules, and it is scarcely conceivable that the Legislature should have intended that a person who estimated the amount of his gains and profits to the best of his judgment and belief according to those rules should be liable to the penalties imposed by s. 55 if he should not apply them with perfect accuracy, and if his estimate was consequently incorrect.

That this is so is shewn by reading the 190th section. This section provides that "The schedule marked G, with the rules and directions therein contained, shall, in making returns of the amount of annual value or profits on which any duty is chargeable under this Act so far as the same are applicable to each person," be observed by the persons making them. One of the rules applicable to the declaration of a person returning a statement of profits under Sched. D is the 15th rule. It provides that the person shall declare the truth of the statement, and that

the profits are fully stated upon every description of property appertaining to the declarant "estimated to the best of his judgment and belief according to the directions and rules of the Act."

H. L. (E.)

1909

ATTORNEY-  
GENERALv.  
TILL.

Lord Atkinson

If in making this estimate he applies those rules and directions according to the best of his judgment or belief he is not liable to these penalties, though he may have perchance fallen into error. I do not think there is anything in s. 129 inconsistent with this construction of s. 190. If a person discovers that the statement he has lodged, though framed according to the best of his judgment and belief at the time he made it, is wrong in fact, he might be guilty of a fraud upon the revenue if he allowed himself to be assessed on an estimate which he subsequently discovered to be erroneous. Accordingly s. 129 provides that when he discovers any defect or wrong statement in the statement he has delivered he may correct it. No doubt the words "and such person shall not afterwards be subject to any proceedings by reason of such omission or wrong statement" would seem to suggest that the person would be liable if he had made a statement not true in fact, though true and accurate according to his belief, but I do not think this is enough to override the plain words of s. 190 and the rules.

In this case the question left to the jury was not framed precisely as it should have been. They should, in my opinion, have been asked whether in their opinion the respondent in making his return applied the rules in the schedule according to the best of his judgment and belief. They have found, in answer to the question left to them, that he was guilty of negligence in framing this statement, which I think must be taken to be a finding that he did not estimate his gains and profits "to the best of his judgment and belief according to those rules." His statement was admittedly incorrect, and having regard to this finding I think he became liable to the penalty sued for. The decision of the Court of Appeal was, in my opinion, wrong and should be reversed, and this appeal be allowed with costs.

LORD GORELL. My Lords, the appeal in this case is from an order of the Court of Appeal, dated the 17th of February, 1909,



H. L. (E.)  
 1909  
 ~~~~~  
 ATTORNEY-
 GENERAL
 v.
 TILL.
 ~~~~~  
 Lord Gorell.

allowing an appeal by the respondent from a judgment of the Lord Chief Justice of England, dated the 10th of July, 1908, and ordering judgment to be entered for the respondent with costs of the appeal to the Court of Appeal and of the trial in the King's Bench Division.

The judgment of the Lord Chief Justice was for the present appellant for 50% and costs, upon an information filed against the respondent under the Income Tax Act, 1842.

The case raises a point of law on the construction of the 55th section of the said Act of 1842, and it is unnecessary for its determination to set out the facts, except so far as to state that in April, 1907, proceedings were instituted by the Attorney-General against the respondent for not sending in a correct return of his profits and gains as a solicitor for assessment of income tax under Sched. D of the said Act, which is kept in force for the year of assessment in the case by the Finance Act, 1905. Sect. 6, sub-s. 2, of the latter Act puts in force all such enactments relating to income tax as were in force on April 5, 1905, including the said Act of 1842.

The return in question was made by the respondent on May 20, 1905, and was less by a sum of 200% than it should have been in circumstances which were detailed in the evidence.

It was admitted at the trial before the Lord Chief Justice that the return was incorrect. There was no suggestion that it was fraudulently made, but the jury found that there was neglect upon the part of the respondent.

The Lord Chief Justice followed the decision of the Scottish Courts in the case of *Lord Advocate v. Sawers* (1), but the Court of Appeal differed from the conclusion arrived at in that case.

The question mainly turns on ss. 52 and 55 of the statute of 1842; but, as leading up to those sections, it will be convenient to refer to a few earlier sections.

Under s. 47 the assessors are to fix general notices on church doors, &c., requiring all persons who are by the Act required to make out and deliver any list, declaration, or statement to make out and deliver the same as directed within a limited time.

(1) 35 Sc L. R. 190.

Under s. 48 the assessors have to deliver to or at the houses of persons chargeable with duties notices requiring them to prepare and deliver as directed all such lists, declarations, or statements as they are respectively required to do by the Act within a limited time, and in case of refusal or neglect to comply with the requirement, "then the Commissioners shall forthwith issue a summons under their hands to such person making default as aforesaid in order that the penalty for such refusal or neglect may be duly levied; and the said Commissioners shall, moreover, proceed to assess, or cause to be assessed, every person making such default in manner herein directed."

H. L. (E.)

1909

ATTORNEY-  
GENERALr.  
TILL.

Lord Gorell.

Sect. 49 merely prescribes the place of delivery. Sect. 50 requires every person, when required as prescribed, to prepare and deliver a list in writing containing "to the best of his belief" the names of lodgers, inmates and others, &c., provided that no person shall be liable to the penalties thereafter mentioned for any omission of the name or residence of any person in his service or employ and not resident in his dwelling-house, if it shall appear to the Commissioners that such person is entitled to be exempted from duty.

Sect. 51 requires every person acting for another to prepare and deliver a list in writing in such form as the Act requires, signed by him, containing "a true and correct statement" of the particulars mentioned in the section, in order that the duty may be duly charged.

Sect. 52 provides that every person chargeable under the Act shall, when required so to do, whether by any general or particular notice given in pursuance of the Act (that is, under ss. 47 or 48) within the period to be mentioned in such notice as aforesaid, prepare and deliver to the person appointed to receive the same, and to whom the same ought to be delivered, *a true and correct statement in writing* in such form as the Act requires, and signed by the person delivering the same, containing the amount of the profits or gains arising to such person from all and every the sources chargeable under the Act according to the respective schedules thereof, which amount shall be estimated for the period and according to the respective rules contained in the respective schedules of the Act, and to the statement is to be

H. L. (E.)  
1909  
ATTORNEY-  
GENERAL  
v.  
TILL.  
Lord Gorell.

added a declaration that the same is estimated on all sources contained in the said several schedules, describing the same, after setting against or deducting from such profits or gains such sums, and no other, as are allowed by the Act; and every such statement is to be made exclusive of the profits and gains accrued or accruing from interest of money or other annual payment arising out of the property of any other person for which such other person ought to be charged by virtue of this Act.

It may be here noticed that, by s. 190, Sched. G and the rules therein are to be observed in executing the Act, and that the 15th rule requires a general declaration by each person returning a statement of profits under (inter alia) Sched. D, declaring the truth thereof, and that the same is fully stated on every description of property or profits included in the Act relating to the said duties and appertaining to the party, estimated to the best of his judgment and belief, according to the directions and rules of the Act. The form for making this declaration is on page 3 of the return made by the respondent, just above his signature.

It will be seen that the 52nd section imposes a statutory duty on the person chargeable to do three things—to prepare the statement, to sign it, and to deliver it; and, further, it is to be true and correct; but this may well mean in the sense prescribed by the 15th rule of Sched. G. The respondent's statement was not true and correct in any such sense, for the finding of the jury disposed of any suggestion that the estimate had been made to the best of his judgment and belief.

Sect. 53 imposes on a trustee or agent of a person incapacitated or non-resident in Great Britain the duty of delivering a true and correct statement in writing, signed by the trustee or agent, of the amount of the profits or gains to be charged on him on account of such other person. The duty thus imposed receives a qualification in favour of trustees by virtue of the latter part of s. 55.

Sect. 54 imposes the duty on officers of corporations to prepare and deliver true and correct statements of the profits and gains to be charged, estimated on the annual profits before dividend made.

The 55th section is as follows : “ That if any person who ought by this Act to deliver any list, declaration or statement as aforesaid; shall refuse or neglect so to do within the time limited in such notice, or shall under any pretence wilfully delay the delivery thereof, and if information thereof shall be given, and the proceedings thereupon shall be had before the Commissioners acting in the execution of this Act, every such person shall forfeit any sum not exceeding twenty pounds and treble the duty at which such person ought to be charged by virtue of this Act, such penalty to be recovered as any penalty contained in this Act is by law recoverable, and the increased duty to be added to the assessment, but, nevertheless, subject to such stay of prosecution or other proceedings by a subsequent delivery of such list, declaration or statement, in the case following; (that is to say) if any trustee, agent or receiver, or other person hereby required to deliver such list, declaration or statement on behalf of any other person shall deliver an imperfect list, declaration or statement, declaring himself unable to give a more perfect list, declaration or statement, with the reasons for such inability, and the said Commissioners shall be satisfied therewith, the said trustee, agent or receiver, or other person as aforesaid shall not be liable to such penalty in case the Commissioners shall grant further time for the delivery thereof, and such trustee, agent, receiver or other person shall, within the time so granted, deliver a list, declaration or schedule, as perfect as the nature of the case will enable him to prepare and deliver; and every person who shall be prosecuted for any such offence by action or information in any of Her Majesty’s Courts, and who shall not have been assessed in treble the duty as aforesaid, shall forfeit the sum of fifty pounds.”

This section is ill expressed, so much so that that part of it which relates to trustees, &c., is confused and involved to a degree which renders it almost unintelligible.

It is contended by the respondent that the section applies only to non-delivery of a statement at all, as distinct from delivery of an untrue and incorrect statement, and this contention has been accepted by the Court of Appeal.

As I understand the judgments they are based on three main

H. L. (E.)

1909

ATTORNEY-  
GENERAL

v.

TILL.

Lord Gorell.



H. L. (E.) grounds, namely, that the wording of the section is not such as  
 1909 to impose in plain terms a penalty in the latter case; that to  
 ATTORNEY- hold that it does would have the result that any error or omission,  
 GENERAL however slight or however innocent, would involve liability for  
 T. the penalty, and that this cannot have been intended; and that  
 TILL. other sections in the Act shew that the penalty is confined to  
 Lord Gorell. cases of non-delivery.

In approaching the consideration of the meaning of the section I think it may be observed that when a statutory duty is imposed by a section immediately preceding a penal section it is not unreasonable to expect to find that the sanction is co-extensive with the duty the performance of which is required. The question then is whether that is so in the present case.

First, with regard to the language of the section, it will be noticed that the section relates not only to s. 52, but to several other of the sections above mentioned, in two of which, 48 and 50, penalties are expressly referred to, and this reference must, I think, be to the penalties imposed by s. 55. The 48th section deals with non-delivery and its consequences, and in s. 50 the reference to penalties is clearly in cases where there has been delivery of a list and an omission therein. It would seem, therefore, that s. 55 was intended to impose penalties for breach of the duties imposed, and not merely for non-delivery.

The controversy appears to arise from the omission of the word "such" after the word "any" in the first line of the section, and the consequent puzzle as to what the words "as aforesaid" relate to, i.e., whether to the verb or the nouns, or, in other words, only to mere failure to deliver within the proper time, whether by refusal or neglect, or also to failure to deliver that which, according to the duty imposed, ought to be delivered. In my opinion it is reasonably clear that the word "such" has been inadvertently omitted, and that the section should be read as if it were inserted. This word is found inserted twice a little later on in the section, which has "but nevertheless subject to such stay of prosecution or other proceedings by a subsequent delivery of *such* list, declaration or statement in the case following; (that is to say) if any trustee, agent or receiver, or other person hereby required to deliver *such* list," &c., &c. The word

“such” in these two places must, I think, clearly relate to that which has to be delivered according to the previous sections.

The frame and object of the sections, which are to compel the necessary disclosure for the purposes of taxation, seem to me to shew that the construction contended for by the respondent is unreasonable. I may refer to and adopt the language of the Lord Ordinary (Lord Stormonth Darling) in the case above mentioned, where he says: “If a man were to put in a piece of blank paper and call it a statement, or if he were to lodge a statement flagrantly and extravagantly deficient or incorrect, then, according to the argument of the defender, he would be exempt from prosecution—at all events under s. 55. The reasonable reading of s. 55 is, that if there is a failure to deliver the kind of statement required by s. 52 either by failure to deliver any statement at all, or by delivery of a statement which is untrue or incorrect, then the penalty is incurred and may be recovered in the prescribed manner.”

Then again the insertion of the provision in favour of trustees, &c., whatever its true reading may be, shews that the section is not dealing only with mere failure to deliver. If the earlier part of the section dealt only with such failure, there is no adequate reason why a trustee or agent should be specially dealt with; but there is such reason if he be required under penalty to deliver a true and correct statement, for he may not have the same means of furnishing accurate particulars of another person's income as he would have had if he were preparing a statement of his own. I agree with the President of the Inner House in the aforesaid case, who considered that “the necessary implication of the provision is that a trustee who gives in an incorrect statement would be liable for the penalty but for the relaxation which is enacted in his favour, and the implication necessarily applies to everybody else as well as a trustee.”

Next, with regard to the argument that this construction would give rise to much hardship, because then any error or omission, however innocent, would involve liability for the penalty, and that, therefore, it would be unreasonable so to construe the section, I confess I should not be satisfied without further argument addressed to this point that the penalty would be incurred

H. L. (E.)

1909

ATTORNEY-  
GENERALv.  
TILL.

Lord Gorell.

H. L. (E.) in such a case. It may be that, if a statement is made to the  
 1909 best of the declarant's judgment and belief according to the  
 ATTORNEY- directions and rules of the Act, he is not liable to a penalty  
 GENERAL merely because there is an innocent error or omission; but that  
 v. is not the case before your Lordships, where a return has been  
 TILL. negligently made. It is not necessary, in my opinion, to decide  
 Lord Gorell. any such point in this case. Moreover, it is difficult to suppose  
 that the Crown in such a case would seek to impose a penalty,  
 and even if the attempt were made the relieving s. 129, upon  
 which I will comment further on, would come into play.

Further, it was not disputed that a person neglecting to deliver a list, declaration, or statement would be liable to the penalty if the delivery did not take place within the time limited for the purpose; so that the penalty might (but for the relieving section) be imposed if the delivery took place a day too late, and this might prove to be a greater hardship than the imposition of a penalty for incorrectness. I should expect that common experience would shew that these hardships do not arise in practice, and that, unless there be some contumacy or improper attempt at evasion, difficulties do not usually arise.

Then with regard to the inference, if any, to be drawn from the other sections of the Act which the respondent (who, I may here observe, argued his case extremely well) relied on, and many of which are commented upon in the judgment of the Court of Appeal, I am unable to find that they afford any clear support to the respondent's argument. His principal point was that some of these imposed penalties for offences graver than the mere delivery of an incorrect statement, and yet that the penalties were less severe for those offences than that imposed in the case of such delivery if the contention by the Crown be correct. But this does not necessarily lead to the conclusion that the construction which the Crown supports cannot and ought not to be placed upon the section, and it does not follow that because there are other provisions, notably those in s. 178, against frauds and evasions, the section in question is to receive a different construction to that which ought, according to its terms, to be placed upon it.

One important section requires some further examination,

namely, the 129th. This section is also badly drafted. It may perhaps be doubted whether it applies only to the immediately preceding sections; but it comes in the category of sections relating to Sched. D, and, in my opinion, covers the case of a statement to be made and delivered according to the provisions of s. 52. It refers to both statements and schedules, but I need not in stating its effect refer to the latter. The first part deals with the case of a person who shall have delivered a statement and shall discover any omission or wrong statement therein, and makes it lawful for him to deliver an additional statement rectifying such omission or wrong statement, and such person shall not afterwards be subject to any proceeding by reason of such omission or wrong statement. It seems to be a necessary implication that but for the delivery of such additional statement he would be liable under s. 55 for having delivered an untrue or incorrect statement, and that, therefore, that section should be construed as the Crown contends. It then deals with the case where a person shall not have delivered a statement within proper time, and permits of him delivering a statement at any time before proceedings have been taken to recover the penalty, and thus avoiding proceedings. Its terms then seem to become general, and provide that if any proceeding shall have been actually had before the Commissioners to recover the penalty they may, on proof to their satisfaction that no fraud or evasion whatever was intended, stay such proceedings on terms as to costs. And if proceedings have been commenced in any Court, the Commissioners may certify that in their judgment no fraud or evasion was intended by the party making such omission, and a judge of such Court may stay the proceedings on such terms as he shall think fit. It then deals with the case of the delivery of an imperfect statement, and provides for time being given by the Commissioners if they are satisfied by sufficient reason why a perfect statement cannot be delivered, and for relief against penalty if as perfect a statement be delivered as from the nature of the case can be given.

I am unable to agree with the view that those parts of the section which deal with cases where proceedings have been commenced relate only to cases where there has been no delivery at

H. L. (E.)

1909

ATTORNEY-

GENERAL

v.

TILL.

Lord Gorell.



H. L. (E.)  
 1909  
 ~~~~~  
 ATTORNEY-
 GENERAL
 v.
 TILL.
 ~~~~~  
 Lord Gorell.

all of a statement. This view seems to be partly derived from the use of the word "omission" in the latter half of the section, which, when the terms of the whole section are considered, appears to be used so as to cover omission to deliver at all, and omission to deliver a proper statement.

The section was evidently framed to give persons powers to make a delivery and to make amendments, and although it is ambiguously worded, I think the reasonable meaning to give to it is that it permits of the exercise of the powers conferred by it, in proper cases, both before and after proceedings and both in respect of non-delivery and delivery of an incorrect statement, so as to mitigate hardships which might otherwise arise.

Two further points were made by the respondent in argument before your Lordships: that the powers of surcharge given by s. 161, or the Taxes Management Act, 1880, ss. 63 et seq., ought to have been exercised, so as to permit of relief from penalty, and that the last sentence of s. 55 does not apply to this case, but only to cases where the party in default is one who is required to deliver lists, &c., for the purpose of charging other parties to the duties. I am unable to trace from the record to what extent, if at all, these points were made in the Court of Appeal as bars to the proceedings, for they are not referred to in the judgments; and they do not appear to be of much weight, for, as to the first, the powers of surcharge can hardly be read as extinguishing the operation of s. 55; and, as to the second, it is clear that the alternative proceedings mentioned in the said sentence may be taken against every person upon whom the duties to which the section refers have been imposed, who shall not for offences dealt with by it have been assessed in treble the duty as provided by it.

My Lords, it is matter for regret that the respondent should not have adhered to the position which he accepted in his letter of December 3, 1906, and paid the taxes which he was then willing to pay and the surveyor of taxes was ready to accept. By so doing the respondent would have avoided this unfortunate litigation.

I think the appeal should be allowed with costs here and below, and the judgment of the Lord Chief Justice restored.

LORD SHAW OF DUNFERMLINE. My Lords, the question in issue in this appeal is whether a person who negligently delivers an incorrect return of his profits and gains to the Inland Revenue authorities renders himself liable to the penalty of 50*l.* imposed by s. 55 of the Income Tax Act, 1842.

H. L. (E.)  
1909  
ATTORNEY-  
GENERAL  
v.  
TILL.

That Act has been re-enacted by the Finance Acts of succeeding years. The actual statute under which the particular instance of its application is in question now was the Finance Act, 1905, applying, of course, as it did to the statement by the respondent, Mr. Till, of his income for assessment for the year 1905-6, and returned to the Inland Revenue by him on May 20, 1905.

By the information filed by the Attorney-General, the penalty before mentioned was claimed. After certain proceedings, which need not be referred to, but in the course of which a special jury affirmed that the return had been negligently made, the Lord Chief Justice (Lord Alverstone) directed judgment to be entered for the Crown.

In the case of *Lord Advocate v. Sawers* (1) the same point was also settled favourably to the Crown by a decision of the First Division.

The learned Lords Justices have reversed the judgment of the Lord Chief Justice, have differed from the decision of the Court of Session, and have entered judgment for the defendant. This difference of judicial opinion in the two kingdoms on the construction of an Imperial statute adds importance to the question.

The difference was fully before the minds of the learned Lords Justices, and I have thought it, my Lords, due and respectful to them to consider with much care the reasons upon which they proceed. These are compendiously and conveniently formulated in a series of propositions, six in number, by the learned Master of the Rolls, to which I shall afterwards refer *seriatim*.

The case has been argued before your Lordships' House upon the footing that while neglect has thus been affirmed the respondent was not guilty of any fraudulent conduct. I think that the admission to that effect by the Crown was entirely proper.

(1) 35 Sc. L. R. 190.

H. L. (E.)      If the penalty is due, it is agreed that it is alone exigible under  
1909      s. 55. [His Lordship read that section.]

ATTORNEY-      It is agreed (1.), of course, that the respondent falls within  
GENERAL  
v.  
TILL.      the category of "any person who ought by this Act to deliver  
any list, declaration, or statement as aforesaid"; that (2.) he  
is not in a position, as trustee, agent, or receiver, to escape  
liability for the penalty, or obtain further time to cure "an  
imperfect list, declaration, or statement," or to deliver a list, &c.,  
"as perfect as the nature of the case will enable him to prepare  
and deliver"; (3.) that he has not been assessed in treble the  
duty; and (4.) that the forfeiture of 50*l.* would accordingly apply  
if the list, declaration, or statement required by statute was not  
timeously returned.

Lord Shaw of  
Dunfermline.

Mr. Till maintains, however, that "any list, declaration, or statement as aforesaid" means a list, declaration, or statement of any kind, true or untrue, correct or incorrect. The Crown maintains that the words "list, declaration, or statement as aforesaid" refer to s. 52 and provide for a true and correct statement in writing. That is the whole point, apparently very simple, of the case.

Other sections of the Act have been relied on in the Court below and in the arguments before this House. The chief of these are three in number. By s. 48 it is provided that assessors shall deliver at the residences of persons chargeable notices "requiring every such person to prepare and deliver, in manner directed by this Act, all such lists, declarations, and statements as they are respectively required to do by this Act."

What, my Lords, are "such lists," &c., "as they are respectively required" "to prepare and deliver"? The answer to that question is contained in s. 52. [His Lordship read that section.]

I do not think that it requires anything more than the language of this section to shew that what is fundamental to it is the truth and correctness of the statement in writing thus required to be prepared and delivered. This is positively and naturally demanded, because by it a taxing basis is reached, and upon it taxation proceeds. The statement in the case of profits and gains must be to some extent *ex necessitate* an estimate according to the best of a deponent's judgment and belief; and this

would no doubt be the interpretation, in short, that under these conditions the statement should be true and accurate as an estimate.

Of the other sections mainly relied on the chief is s. 129. It has been already seen that in gremio of s. 55 the case of corrections of inaccuracies upon the part of an agent or trustee was dealt with, but it seems to have been thought expedient to make a wider provision for the amendment of returns. Accordingly, s. 129 provides as follows: "Provided always, and be it enacted, that if any person who shall have delivered a statement or schedule shall discover any omission or wrong statement therein, it shall be lawful for him to deliver an additional statement or schedule rectifying such omission or wrong statement, and such person shall not afterwards be subject to any proceeding by reason of such omission or wrong statement; and if any person shall not have delivered a statement or schedule within the time limited by the Commissioners for that purpose, it shall be lawful for him to deliver a statement or schedule in manner herein directed at any time before a proceeding shall be had to recover the penalty herein mentioned, and no proceeding shall be afterwards had for recovering such penalty; and if any proceeding shall have been actually had before the Commissioners for recovering such penalty, it shall be lawful for the same Commissioners on due proof to their satisfaction that no fraud or evasion whatever was intended to stay such proceedings, either on the terms of paying or without paying the costs then incurred, as the Commissioners shall think fit, and if any proceeding shall have been commenced in any Court, it shall be lawful for the Commissioners to certify, that in their judgment no fraud or evasion was intended by the party making such omission, and it shall be lawful for any judge of such Court, on a summary application, to stay such proceedings on such terms as he shall think fit; or if such person shall have delivered an imperfect statement or schedule, and shall give to the Commissioners a sufficient reason why a perfect statement or schedule cannot be delivered, the said Commissioners, being satisfied therewith, shall give further time and so from time to time, for the delivery of such statement or schedule; and such person shall not be liable

H. L. (E.)

1909

ATTORNEY-  
GENERAL;v.  
TILL.Lord Shaw of  
Dunfermline.



H. L. (E.)  
 1909  
 ATTORNEY-  
 GENERAL  
 ?  
 TILL.

Lord Shaw of  
 Dunfermline.

to any penalty for not having delivered such statement or schedule within the time before limited, in case such person shall have delivered as perfect a statement or schedule as from the nature of the case he was enabled to give, and so from time to time as long as the Commissioners shall grant further time as aforesaid."

It is admitted that the respondent did not deliver any rectifying or additional statement or schedule; that the Commissioners have not made any certification; and that, in short, s. 129 has not been and cannot now be invoked. Mr. Till maintains that his statutory duty was completely discharged by returning a declaration or statement, although that declaration or statement was negligently untrue and inaccurate. This contention has been confirmed by the Court of Appeal.

I now turn to the Master of the Rolls' reasons, to which I have alluded. The proposition of the learned judge is that s. 55 "applies only to non-delivery as distinct from delivery of an imperfect or inaccurate statement."

The first point mentioned in support thereof is: "The Act in other sections speaks of a person as having delivered 'such account as aforesaid' although it is false (see s. 68 and s. 178)."

My Lords, I have looked at the sections referred to, and it humbly appears to me that there would be no real inconsistency, even although s. 55 had stated in terms that the taxpayer was to deliver a true and accurate statement, in making subsequent provision imposing penalties for the delivery of "false or fraudulent" accounts, statements, and so forth. The main duty imposed being to make statements which are true and accurate, it in no way appears to me inconsistent with the duty of making them true and accurate that "every person who shall wilfully deliver any such account as aforesaid which shall be false" shall be liable to a penalty. By "such account as aforesaid" it can, of course, be maintained that there is a repugnancy in language between "such true and accurate account" and "which shall be false"; but the real meaning of the language employed in different sections of the Act of Parliament is to make operative both a duty and a penalty, and this is done quite simply by treating the phrase "such account as aforesaid which shall be

false" as equivalent to the providing of a penalty for the falsehood of that which was bound to be returned as true. It purported to be true, it turned out to be false, and all that the sections relied upon provide is simply to penalize wilful delivery of a false account.

The second point mentioned by the Master of the Rolls is as follows: "The words 'as aforesaid' naturally refer to s. 48, where the words are 'make out such lists, declarations, or statements as may be applicable to such person'; that is to say, lists, declarations, or statements of the character appropriate to the particular person and nothing more. To avoid misconception, I may add that a document may be so illusory that the tribunal would be justified in holding that there had been no delivery; but no such case arises here."

My Lords, I can only say that it appears to me to be the sounder view that the words "as aforesaid" refer to all the previous sections dealing with the list, declaration, or statement, including very particularly s. 52. I fail to understand why the reference in s. 55 should be held to be made to s. 48 and not to the later and nearer section, namely, s. 52. It provides actually what the statement is to be, and expressly that it is to be true and accurate. I cannot bring myself to understand why in s. 55, declaring the penal consequences of not delivering "any list, declaration, or statement as aforesaid," it should be permissible to omit the reference to s. 52, which answers the reference of the words "as aforesaid" by telling what and what manner of statement is not to be refused, neglected, or delayed.

But it humbly appears to me that s. 48 does not bear the construction put upon it by the Court of Appeal. The learned Master of the Rolls says "the words 'as aforesaid' naturally refer to s. 48, where the words are 'make out such lists, declarations or statements, as may be applicable to such person.'" My Lords, no doubt these words do occur in the latter portion of s. 48—that portion dealing with the case of refusal to make out such statements, &c., "as may be applicable to such person." But, my Lords, what are the statements there referred to? They are mentioned in the earlier portion of s. 48 itself, which deals with the notice demanding the return, and it does so in

H. L. (E.)

1909

ATTORNEY-  
GENERAL  
v.  
TILL.

Lord Shaw of  
Dunfermline.

H. L. (E.) these words: "requiring every such person to prepare and  
 1909 deliver, in manner directed by this Act, all such lists, declara-  
 ATTORNEY- tions, and statements as they are respectively required to do by  
 GENERAL this Act." This, as I say, is the language of s. 48 itself. Where  
 " and how is it that they are so "required"? It is under s. 52,  
 TILL. and the requirement is to deliver "a true and accurate state-  
 Lord Shaw of ment." The three sections accordingly—ss. 48, 52, and 55—run  
 Dunfermline. accurately together.

I only add with regard to this point, and the use of the word "illusory" by the Master of the Rolls and the other learned judges of the Court of Appeal, that if by the word "illusory" be meant something seemingly accurate, but in fact deceptive, that does not, in my humble judgment, render the return no return, but it renders it an untrue and inaccurate return, and I do not think the reason is supported by the reference to that term.

The third point is: "The Act contains provisions not of a penal character for rectifying any omission or wrong statement in a statement or schedule (s. 129)."

My Lords, I regret that I am compelled very strongly to differ with regard to the inference to be derived from s. 129. The provision by statute of a means of escape from penal consequences on convincing the authorities that there was no fraud and that the error was excusable seems to me conclusively to point to the initial duty having been to make a true and accurate statement. Both in construing and in administering this Act of Parliament it would appear to me to be a strong and, indeed, extraordinary thing to hold that the method of arriving at a true and accurate basis of taxation was to say to the taxpayer, You may deliver anything, true or untrue, accurate or inaccurate, and thereupon you may proceed in the direction of accuracy by appeals to the authorities, presumably on the eve of possible proceedings of a penal character, to permit correction of what was initially wrong. The simpler and better construction of the statute would appear to be that when a taxpayer is required to make a statement "as aforesaid" he is to make it true and accurate, and from the administrative point of view this would enable all the authorities to start departmental work upon the natural and businesslike assumption of a first datum of accuracy.

The fourth point is as follows: "The Act imposes a penalty on a false or fraudulent statement which is less severe than that which on the other hypothesis is imposed upon an honest mistake (s. 178)."

H. L. (E.)

1909

ATTORNEY-  
GENERALv.  
TILL.Lord Shaw of  
Dunfermline.

This, my Lords, is well worthy of consideration. The Act itself in its course is directed against great varieties of irregularities, inaccuracies, omissions, delays, and fraudulent and negligent practices. Mr. Till, in his careful argument, went through the relevant sections, and it became quite apparent that it would be unsafe to deduce from them any view that penalties were graduated in this Inland Revenue Act on any scale of moral delinquency. One administrative reason may be referred to, namely, this: totally irrespective of the presence or absence of fraud, a defect in certain particulars or returns, if easily passed over, or unless heavily punished, might become widespread and habitual, and so cause great interruption to the efficiency of the departmental work. I think this observation apt in reference to the return in question here, which forms, in my view, a cardinal and fundamental part of the claim of taxation. I observe also that the mitigations possible under s. 129 pro tanto dissipate any argument grounded on comparative severity.

The fifth point stated is as follows: "The proviso in the middle of s. 55, dealing with the case of trustees acting on behalf of parties chargeable, presupposes non-delivery of any statement, and then authorizes a delivery after prosecution of an imperfect list."

My Lords, this view seems to be inconsistent with the provisions and terms of s. 55 itself. That section, my Lords, does not appear to me to presuppose "non-delivery of any statement" by trustees. Its provisions are expressly if a trustee "shall deliver an imperfect list," &c., . . . "declaring himself unable to give a more perfect list." The point need not be further referred to, except to add that this provision as to trustees confirms the view of s. 55 to the effect that under it accuracy is expected all round, but that in the case of trustees who may not have access to the information which presumably would be in the possession of an ordinary taxpayer dealing with his own



H. L. (E.) gains and profits special provisions for dealing with delay or imperfections not unnaturally occur.

1909

ATTORNEY-  
GENERAL

v.  
TILL.

Lord Shaw of  
Dunfermline.

The sixth point is: "The revenue is protected by the power possessed by the Commissioners to assess a person making default (s. 113), and to surcharge (ss. 161, 162)."

My Lords, the power of assessment and surcharge does not appear to me to assist the construction of s. 55. Such powers are inserted in the Act simply because, in addition to all kinds of penalties, the Board of Inland Revenue must ingather taxation; and if the taxpayer will not furnish the information himself, some means must be provided of recovering the duty, and these powers are given to enable the Board to proceed with the best available estimate.

My Lords, my respect for the learned Lords Justices has constrained me to follow the exact lines of the investigation into these provisions which they have themselves pursued. In the result, and for reasons which have already sufficiently appeared in the course of the inquiry, I have come to the conclusion that the judgment of the learned Lord Chief Justice was correct and ought to be restored.

With regard, my Lords, to the decision of *Sawers* (1), I see no reason whatever for adopting the view that it was inadequately presented or imperfectly considered. The Lord Ordinary, Lord Stormonth Darling, expressed his opinion thus: "It seems to me that when s. 55, coming as it does immediately after s. 52, refers to 'any statement as aforesaid,' it must be understood as meaning the true and correct statement which is required by s. 52. Anything else would really lead to absurdity. If a man were to put in a piece of blank paper, and call it a statement, or if he were to lodge a statement flagrantly and extravagantly deficient or incorrect, then according to the argument of the defender, he would be exempt from prosecution, at all events under s. 55. The reasonable reading of s. 55 is that, if there is a failure to deliver the kind of statement required by s. 52, either by delivering no statement at all, or by delivering a statement which is untrue or incorrect, then the penalty is incurred and may be recovered in the prescribed manner."

To the cogency, my Lords, of the opinion of this distinguished judge it might have been possible to add one other consideration; and that consideration is added by my learned predecessor, Lord Robertson, in these words: "The provision in favour of trustees in the 55th section does not apply directly to a prosecution in one of Her Majesty's Courts, but it bears on the present question, because the necessary implication of the provision is that a trustee who gives in an imperfect return would be liable to the penalty but for the relaxation which is enacted in his favour, and the implication necessarily applies to everybody else as well as a trustee."

My Lords, these dicta express fully and clearly my opinion as to the sound construction of the Act. In my view, *Sawers' Case* (1) was rightly decided in Scotland, and this English appeal should be allowed.

H. L. (E.)

1909

ATTORNEY-  
GENERALv.  
TILL.Lord Shaw of  
Dunfermline.

*Order of the Court of Appeal reversed and judgment of Lord Alverstone C.J. restored with costs here and below.*

*Lords' Journals*, December 8, 1909.

Solicitors: *Sir Francis Gore, Solicitor of Inland Revenue; Lovell, Son & Pitfield, for Herbert Till, Dorchester.*

(1) 35 Sc. L. R. 190.

[HOUSE OF LORDS.]

H. L. (E.)  
1909  
Dec. 13.

BRITANNIC MERTHYR COAL COMPANY,  
LIMITED . . . . .

AND

DAVID . . . . .

APPELLANTS;  
RESPONDENT.

*Master and Servant—Negligence—Burden of Proof—Statutory Duty—Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 12, s. 50—Coal Mines Regulation Act, 1896 (59 & 60 Vict. c. 43), s. 6.*

An explosion in a mine was caused by a blasting operation conducted in breach of the rules of the Coal Mines Regulation Acts. In an action against the mine-owners to recover damages for injury to a miner by the explosion the judge held that the burden of proving that the owners had neglected their duty to enforce the statutory rules lay on the plaintiff, and, as the plaintiff had failed to produce evidence on that point, the defendants obtained a verdict and judgment:—

*Held*, that upon the question whether the mine authorities had done their duty in taking proper care of the safety of the miners the burden of proof did not lie upon the plaintiff.

Order of the Court of Appeal for a new trial, [1909] 2 K. B. 146, affirmed, but some of the reasons disapproved.

THE circumstances of this appeal are stated in the judgment of the Earl of Halsbury.

Dec. 9, 10. *B. Francis-Williams, K.C.*, and *Eldon Bankes, K.C.* (*Trevor Lewis* with them), for the appellants, contended that there was no evidence of negligence or breach of any statutory duty in the appellants, and urged the arguments used in the Court below and there reported.

*Sir Robert Finlay, K.C.*, and *Abel Thomas, K.C.* (*Sankey, K.C.*, and *Clive Lawrence* with them), for the respondent, contended that the burden of proof that the appellants had fulfilled their statutory duties lay on them: ss. 49, 50.

The following cases were referred to:—*Priestley v. Fowler* (1), *Howells v. Landore Steel Co.* (2), *Groves v. Lord Wimborne* (3), and *Hole v. Sittingbourne and Sheerness Ry. Co.* (4), cited by the Earl of Halsbury.

- (1) (1837) 3 M. & W. 1.

(2) (1874) L. R. 10 Q. B. 62.
- (3) [1898] 2 Q. B. 402.

(4) (1861) 6 H. & N. 488.

Dec. 13. EARL OF HALSBURY. My Lords, this is an appeal from a judgment of the Court of Appeal directing a new trial in an action by the widow of a man employed in a coal mine of the defendants and who was killed together with several others by an explosion in the mine on December 14, 1907.

It is not now matter of debate that the explosion was caused by a blasting operation (technically called a shot) which was required to remove a piece of rock which rendered it difficult to enlarge the main haulage road of the mine for the purpose of putting some electric wires required therein.

There are certain rules which have the force of a statute applicable to this colliery, and among them are rules applicable to the main haulage roadway and to dry and dusty parts of the mine when blasting operations are required.

The place where the operation in this case was performed is both dry and dusty and is the main haulage roadway of the colliery. The rules in such case require that only a particular class of explosives shall be used; that within a certain distance the intended site of the explosion shall be made wet artificially if it is not already wet naturally (which this place was not); that with some special exceptions the men shall be withdrawn and the shot shall be fired by a particular man who shall be appointed specially for the purpose; and that the shot selected for blasting shall be selected by the manager of the mine, who shall also see that the proper explosive material shall be brought into the mine for use.

Further, to ensure the proper material being used, and as, I suppose, he cannot be supposed to have sufficient chemical knowledge himself, he is protected if a properly signed certificate by an authority recognized by the rules certifies the genuineness of the authorized explosives.

The work in respect of these electric wires began somewhere about July or August, before the explosion on December 14.

The cause was tried by Channell J. on July 29, 1908, and it was found that the cause of the explosion was the firing of a shot in a dry and dusty part of the mine; that it was fired in a prohibited area where certain precautions were required to be taken, *none of which were taken*; and, further, there was evidence that

H. L. E.)

1909

BRITANNIC  
MERTHYR  
COAL  
COMPANY,  
LIMITED  
?.  
DAVID.



H. L. (E.)  
1909  
BRITANNIC  
MERTHYR  
COAL  
COMPANY,  
LIMITED  
v.  
DAVID.  
Earl of  
Halsbury.

gunpowder was found in two holes bored for the purpose of being fired, and evidence was given rendering it reasonably certain that the explosion itself had been caused by gunpowder, *a prohibited explosive*.

It was further found that a man named Watkin Evans, who was seen boring the hole which was to be blasted, gave an order to a man named Miles, a collier, who in consequence fetched 2 lbs. of gunpowder and brought it to his house the day before the explosion.

Under these circumstances, which obviously called for some explanation and the burden of proving that the authorities of the mine had done their duty in taking proper care of the safety of the miners, Channell J., to my mind, misdirected the jury in placing the burden of proof upon the plaintiff in the action.

My Lords, I have been thus particular in pointing out why in my opinion this verdict cannot be allowed to stand, since I think the learned judge misdirected the jury as to the onus of proof, and though he left the question to the jury he left it in such a way and with such a direction that it was hardly possible for them to find any other verdict. Yet, though I am agreeing with the conclusion arrived at by the majority of the Court of Appeal (1), I am by no means prepared to adopt the reasoning by which that conclusion is arrived at. Indeed it is not too much to say that I dissent from some of the propositions involved in that judgment.

I am, however, very clearly of opinion that there ought to be a new trial, since I think the conclusion was arrived at as a consequence of the misdirection.

I therefore am of opinion that the appeal should be dismissed, and I move your Lordships accordingly.

LORD ASHBOURNE. My Lords, I concur.

LORD ATKINSON. My Lords, I concur.

LORD GORELL. My Lords, in the circumstances of this case I agree with my noble and learned friend the Earl of Halsbury

(1) Fletcher Moulton and Buckley L.J.J. (Cozens-Hardy M.R. dissenting).

that there should be a new trial; and I agree with him in expressing dissent from some of the reasons for a new trial which are given in the Court of Appeal.

H. L. (E.)  
1909

BRITANNIC  
MERTHYR  
COAL  
COMPANY,  
LIMITED  
v.  
DAVID.

LORD SHAW OF DUNFERMLINE. My Lords, I entirely concur.

*Order of the Court of Appeal affirmed and appeal dismissed with costs; the general costs of the cause, apart from the issues now already determined, to abide the event of the new trial.*

*Lords' Journals, December 13, 1909.*

Solicitors: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare; Smith, Rundell & Dods, for Morgan, Bruce, Nicholas & James, Pontypridd.*

[HOUSE OF LORDS.]

|                                     |              |            |
|-------------------------------------|--------------|------------|
| COLDRICK . . . . .                  | APPELLANT;   | H. L. (E.) |
| AND                                 |              | 1909       |
| PARTRIDGE, JONES & CO., LIMITED . . | RESPONDENTS. | Dec. 13.   |

*Master and Servant—Common Employment—Risk incidental to Employment—Negligence of Fellow Servants—Implied Term of Contract of Service.*

Colliery proprietors, who possessed a railway in connection with the colliery, ran a train thereon for the carriage of their colliers, free of charge, from the colliery towards their homes after the day's work. One of the colliers while being so carried met his death through an accident occasioned by the negligence of servants of his employers engaged in the repair of a bridge over the railway:—  
*Held*, that the deceased must as between himself and his employers be deemed to have undertaken the risk of such an accident, and that an action could not be maintained against his employers under the Fatal Accidents Act, 1846, in respect of his death.  
Decisions of Bray J. and the Court of Appeal, [1909] 1 K. B. 530, affirmed.

The defence of common employment was set up in the action against the respondents referred to in the head-note. The

H. L. (E.) details of the accident are stated in the judgment of Bray J.,  
 1909 who found that the collieries and the railway were worked  
 COLDRIK, as one concern with one common object, and that each of the  
 v. men employed there by the colliery proprietors was the fellow  
 PARTRIDGE, servant of the others within the rules laid down in the cases  
 JONES & CO., LIMITED. cited by his Lordship; that the deceased man must be deemed  
 to have accepted the risk; and therefore that the defendants  
 were entitled to judgment. This decision was affirmed by the  
 Court of Appeal (Vaughan Williams, Farwell, and Kennedy L.JJ.).  
 Hence this appeal.

Dec. 8, 13. *Abel Thomas, K.C.* (*Sankey, K.C.*, with him), for the appellant. The doctrine of common employment laid down in *Priestley v. Fowler* (1) does not apply to the present case. The doctrine is only applicable where the injured person is actually engaged in his master's work. Lord Herschell in *Johnson v. Lindsay* (2) intimated his opinion that the doctrine had gone far enough and ought not to be extended. The appellant's husband was not at the time of the accident at work for the respondents; not in their employ. His work was over, and the principles applicable are not those which obtain between master and servant, but those which govern the relations of licensor and licensee. The employment must be not only common, but simultaneous. In *Bartonshill Coal Co. v. McGuire* (3) Lord Brougham said "to bring the case within the exemption there must be this most material qualification, that the two servants shall be in the same common employment, and engaged in the same common work under that common employment." Within these words there was no common employment here. It was no part of the contract of service that Coldrick should travel by this train, and therein the case differs from *Hutchinson v. York, Newcastle, and Berwick Ry. Co.* (4), where the man was killed during the discharge of his duty. Where that is not so Alderson B. said "the servant injured is substantially a stranger, and entitled to all the privileges he would have had if he had not been a

(1) (1837) 3 M. & W. 1.

(2) [1891] A. C. 371.

(3) (1858) 3 Macq. 300, 313.

(4) (1850) 5 Ex. 343; 19 L. J. (Ex.

296.

servant." In *Tunney v. Midland Ry. Co.* (1) Erle C.J. lays down the same condition: "The only question is whether the plaintiff was at the time in the employ of the company. Clearly he was." Clearly here Coldrick was not. Bramwell L.J. in *Swainson v. North Eastern Ry. Co.* (2) expresses the doctrine differently; he says it is "not limited to the case of servants; it extends to guests, who cannot sue the master of the house for an injury done by his servants." But he bases it not on an imagined contract by the servant to take the risks of his service, but on the absence of a stipulation by the servant "for a right of action against his master if he sustains damage from the negligence of a fellow servant." There must therefore be not only common employment, but common service, which there was not here. So in *Charles v. Taylor* (3) Brett L.J. says: "When the two servants are servants of the same master and where the service of each will bring them so far to work in the same place and at the same time that the negligence of one in what he is doing as part of the work which he is bound to do may injure the other whilst doing the work which he is bound to do, the master is not liable to the one servant for the negligence of the other." That means that the condition of the master's exemption is that both servants shall be at work for the common master at the moment when the accident happens.

*Francis-Williams, K.C.*, and *Albert Parsons*, for the respondents, were not heard.

LORD LOREBURN L.C. My Lords, the principle involved in *Priestley v. Fowler* (4), of which this appeal is an illustration, is long settled, and repetition only tends to confuse a statement of law which has been well established. The question here is whether or not that principle is to apply to a case where the unfortunate man's work had actually been finished when the accident occurred, and where the accident happened while he was returning home in a train furnished gratuitously by the employers to take workmen home, which they might use or not as they pleased. That the hours of work were over is immaterial,

H. L. (E.)  
1909  
COLDRICK  
v.  
PARTRIDGE,  
JONES & Co.,  
LIMITED.

(1) (1866) L. R. 1 C. P. 291.

(3) (1878) 3 C. P. D. 492.

(2) (1878) 3 Ex. D. 341.

(4) 3 M. & W. 1.



H. L. (E.) for the point is one of fact: must it be implied that the deceased  
 1909 took the risk of accident when travelling in the train? The real  
 COLDRICK argument, if the appeal is to prevail, must be that the risk was  
 v. one not really incidental to the service, and that therefore there  
 PARTRIDGE, was no contract to be implied on the part of the deceased to  
 JONES & CO., take the risk of that journey.  
 LIMITED.

Lord Loreburn  
 L.C.

The law applicable to that question was stated long ago in *Bartonshill Coal Co. v. McGuire* (1) by Lord Chelmsford L.C. in this House. He said: "It is necessary, however, in each particular case to ascertain whether the servants are fellow-labourers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence in the course of his peculiar work, is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him." I think those words are clear and sufficient. On these facts are we to imply a condition that the deceased took the risk of the negligence of the servant who left the scaffolding too near the line and thereby caused this accident? I think Vaughan Williams L.J. states the conclusion accurately in his judgment: "The implied contract which arose as between the defendants and the servant was this: 'Whenever I avail myself of the means of access which I see are provided at this colliery for the men on occasions of access or departure, I will take the risk of the negligence of those servants of yours who have the control of the railway, or who have the control of—not the running of the carriages—but also the roadway itself and its necessary adjuncts, such as bridges or reparation of the four-foot way or anything else. I take these risks.'"

It is impossible in every case of this kind not to wish that compensation should in some way or other be made payable to those who have suffered by the accident, but we have no right to

(1) 3 Macq. at p. 307.

stretch the law for any such humane purpose at the expense of other people. H. L. (E.)

I do not think that the principle of this case differs from that of *Tunney v. Midland Ry. Co.* (1), which was cited.

I therefore move that the appeal be dismissed with costs.

1909  
COLDRIK  
v.  
PARTRIDGE,  
JONES & CO.,  
LIMITED.

LORD ATKINSON. My Lords, I concur.

The question must always be what risk a person like the deceased must be supposed to have known and undertaken when he entered the service of the defendants. In this case he was entitled to the privilege of going to and returning from his work in his employers' train. He enjoyed that privilege because he was a workman, and in that character alone. It is admitted that if he had been bound by the terms of his employment to journey to and from his work in this train he could not have recovered damages; and in my opinion when he avails himself of the privilege given he must be presumed to have known the risks attending upon the journey and undertaken them quite as much as if he had been bound to do that which he was privileged to do and did.

LORD GORELL. My Lords, I also concur. I agree with the judgments which have been delivered in the Court of Appeal. One passage from the judgment of Kennedy L.J. sums up the position in this case briefly and clearly: "It seems to me that, while there is not in this case, as there was in the case which has been referred to, *Tunney's Case* (1), an actual contract or, as Willes J. said in that case, it was not a part of that contract that the plaintiff should be carried in the train, it was the fair inference which Bray J. has drawn from the relation of the parties that his user of that train coming from the work was to be a user carrying with it as a term the absence of liability on the employer of the responsibility for fellow workmen whose fault, it is found by the jury, killed this poor man while using the train by virtue of the relationship—to use a neutral term—which had been created by the employer."

(1) L. R. 1 C. P. 291.

H. L. (E.)  
 1909  
 COLDRICK  
 v.  
 PARTRIDGE,  
 JONES & Co.,  
 LIMITED.

LORD SHAW OF DUNFERMLINE. My Lords, the language used from the woolsack in this case accurately expresses the opinion which I have formed upon this case. I desire, however, to make an addition to that statement from my own point of view in consequence of the argument upon certain authorities construing the Workmen's Compensation Act, which has been presented so carefully and ably by Mr. Abel Thomas. I adopt the language of Farwell L.J. when he says: "I do not myself regard this case as one in any way affected by the workmen's compensation cases." My Lords, much weight was attached to a judgment in the case of *Davies v. Rhymney Iron Co.* (1) In pronouncing any judgment in this case, my Lords, I must not be taken as assenting either to the ratio of that judgment or to the deductions in argument made from it. Bray J. deals with that point in his observation that "where the employer, as here, has full control over the whole premises, a man might still be in the course of his employment though his actual work was over." That observation, my Lords, is one of much weight; whether it will ultimately decide this question I do not know; but upon that matter I desire to reserve my opinion.

*Order of the Court of Appeal affirmed and appeal dismissed with costs.*

*Lords' Journals, November 13, 1909.*

Solicitors: *Metcalf & Sharpe, for T. S. Edwards, Newport, Mon.; Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

(1) (1900) 16 Times L. R. 329.

## [HOUSE OF LORDS.]

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|------------------------------------------------------------------------|--------------|-----------------|
| GREAT WESTERN RAILWAY COMPANY .                                        | APPELLANTS ; | H. L. (E.)      |
|                                                                        | AND          | 1909            |
| CARPALLA UNITED CHINA CLAY COM-<br>PANY, LIMITED AND ANOTHER . . . . } | RESPONDENTS. | <u>Dec. 16.</u> |

*Mines and "other Minerals"—China Clay—Railway Company—Compulsory Purchase of Surface—Right to Support—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 77, 78.*

China clay lying adjacent to and within lands in Cornwall purchased by the appellant railway company was not part of the ordinary composition of the soil in the district, and its presence was rare and exceptional :—

*Held*, as a matter of fact upon the evidence, that the china clay was a mineral within the provisions of the Railways Clauses Consolidation Act, 1845, and excepted from the lands conveyed to the railway company.

Decisions of Eve J. and the Court of Appeal, [1909] 1 Ch. 218, affirmed.

THE question arising upon this appeal is stated in Lord Macnaghten's judgment. The details of the evidence are given in the judgment of Eve J., which was affirmed by the Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.).

July 16, 19, 20. *Sir A. Cripps, K.C.*, and *P. O. Lawrence, K.C.* (*Howard Wright* and *Colefax* with them), for the appellants. China clay is not a mineral within the meaning of s. 77 of the Railways Clauses Consolidation Act, 1845. It is part of the soil which was purchased by the railway company, and the respondents are not entitled to remove it and thereby endanger the line. It was decided in *Todd, Birlestone & Co. v. North Eastern Ry. Co.* (1) that clay forming the surface or subsoil was included in the land compulsorily taken and was not a mineral. In that case Lord Halsbury pointed out that *Heat v. Gill* (2) was not a decision that china clay is a mineral, and that the question was immaterial in that case, though an injunction was granted. The decision turned on the construction of the particular

(1) [1903] 1 K. B. 603.

(2) (1872) 7 Ch. 699.



H. L. (E.) reservation. *Lord Provost and Magistrates of Glasgow v. Farie* (1) supports the appellants' contention, and an interdict was granted. *Midland Ry. Co. v. Robinson* (2) is in no way inconsistent with *Farie's Case* (1) and does not touch the question, but deals with the method of working, whether underground or open, on the surface. The question is not affected by *Great Western Ry. Co. v. Blades*. (3) This substance is part of the soil, not separable as the recognized minerals, such as coal or iron. The right to support given by the conveyance of 1881 is not taken away by ss. 77 to 85 of the Railways Clauses Consolidation Act.

1909  
GREAT  
WESTERN  
RAILWAY  
v.  
CARPALLA  
UNITED  
CHINA CLAY  
COMPANY,  
LIMITED.

*Sir Robert Finlay, K.C., and Upjohn, K.C. (Astbury, K.C. Christopher James, and Luxmoore with them)*, for the respondents. China clay is a substance essentially distinct from the soil or subsoil and is usually found in pockets at considerable depths from the surface. The authorities with respect to clay are irrelevant. China clay is not clay, and at the date of the Railways Clauses Consolidation Act, 1845, and of the conveyance in the present case (1881) was universally held to be a mineral. The word includes everything which it is commercially worth while to extract from the soil, not being itself part of the soil. In *Todd, Birleston & Co. and North Eastern Ry. Co.* (4) Lord Halsbury explained and differentiated *Hext v. Gill* (5), but did not purport to overrule it. In *Farie's Case* (6) Lord Watson said: "The policy of the Acts in excepting certain minerals from conveyances to compulsory takers of land favours a liberal and not a limited construction of the reservation to the seller." Lord Macnaghten said (7): "The word 'minerals' undoubtedly may have a wider meaning than the word 'mines.' In its widest signification it probably means every inorganic substance forming part of the crust of the earth other than the layer of soil which sustains vegetable life." It certainly was not decided in *Farie's Case* (1) that china clay was not a mineral. In *Midland Ry. Co. v. Robinson* (8) Lord Herschell explained but did not modify the view which he had expressed in *Farie's Case* (1), that

(1) (1888) 13 App. Cas. 657.

(2) (1889) 15 App. Cas. 19.

(3) [1901] 2 Ch. 624.

(4) [1903] 1 K. B. 603.

(5) 7 Ch. 699.

(6) 13 App. Cas. at p. 676.

(7) Ibid. at p. 689.

(8) 15 App. Cas. at p. 26.

the reservation extended "to all such bodies of mineral substances lying together in seams, beds or strata as are commonly worked for profit and have a value independent of the surface of the land." Though the mineralogists decline to define what is included under the term "mineral," the scientific evidence goes to shew that china clay has always been regarded as a mineral.

*P. O. Lawrence, K.C.*, in reply. Practical men do not concern themselves whether scientifically considered china clay is or is not a mineral. The onus rests on the respondents to prove that it is a mineral, and on this the authorities are inconclusive. The soil is granite, more or less decomposed, and the whole formation is granite, the overburden being simply weathered china clay. The true test is whether the substance is obtained by mining as distinguished from quarrying.

H. L. (E.)  
1909  
GREAT  
WESTERN  
RAILWAY  
".  
CARPALLA  
UNITED  
CHINA CLAY  
COMPANY,  
LIMITED.

The House took time for consideration.

Dec. 16. LORD MACNAGHTEN. My Lords, it must, I think, be taken as settled beyond the possibility of doubt or question that the expression "mines of coal, ironstone, slate or other minerals," which occurs in s. 77 of the Railways Clauses Consolidation Act, 1845, is equivalent to the expression "mines and minerals" in common use with conveyancers, and that "such mines," or, in other words, *all mines and minerals*, not expressly purchased by a railway company that purchases lands within or under which minerals may be found, may, in case the company has not agreed to pay compensation, be worked by the owner, lessee, or occupier thereof, complying with the statutory provisions applicable to the case, even though such working may interfere with the use of the railway and absolutely destroy the surface. The only condition to which the working is made subject is that it must "be done in a manner proper and necessary for the beneficial working" of the mines "and according to the usual manner of working such mines in the district where the same are situate."

Such being the law as explained in this House, the only question open on this appeal is a question of fact.

H. L. (E.)  
 1909  
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 GREAT
 WESTERN
 RAILWAY
 v.
 CARPALLA
 UNITED
 CHINA CLAY
 COMPANY.
 LIMITED.
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 Lord  
 Macnaghten.  
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It is not disputed that adjacent to and within the lands which the Great Western Railway Company or their predecessors in title purchased from Lord Clifden's predecessor in title there are deposits of a substance known as china clay. China clay is of considerable value commercially. It is common ground that the usual manner of getting it in the district is by open working, which is destructive of the surface, and it is conceded that that manner of working is proper and necessary for the beneficial working of china clay.

The only question for consideration appears to be this: Is china clay a mineral?

On this point a large body of evidence was adduced at the trial, which occupied eight days, before Eve J. The learned judge reviewed the evidence with great care and came to the conclusion that china clay was not part of the ordinary composition of the soil in the district; its presence was rare and exceptional. He held on the evidence, and held, I think, rightly, that it was a mineral, and therefore, in accordance with the provisions of the Act, excepted from the lands conveyed to the railway company.

The learned judges of the Court of Appeal discussed the evidence at some length and came to the same conclusion.

It would serve no useful purpose to go through the evidence again. It is enough to say that, having listened attentively to the able arguments of the learned counsel for the appellants and to such portions of the evidence as were read to the House, I am satisfied that the decision of Eve J., affirmed by the Court of Appeal, is correct, and that this appeal must be dismissed with costs.

LORDS ATKINSON, COLLINS, and SHAW OF DUNFERMLINE concurred.

LORD LOREBURN L.C. My Lords, I also concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 16, 1909.

Solicitors: R. R. Nelson; Coode, Kingdon & Cotton, for Shilson, Coode & Co., St. Austell; Walker, Martineau & Co.

[HOUSE OF LORDS.]

AMALGAMATED SOCIETY OF RAILWAY }
 SERVANTS } APPELLANTS;
 AND
 OSBORNE RESPONDENT.

H. L. (E.)
 1909
 Dec. 21.

Trade Union—Definition—Objects of Union—Rules—Parliamentary Representation—Ultra vires—Alteration of Rules—Public Policy—Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4, sub-s. 3 (a); ss. 13, 23—Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 16.

There is nothing in the Trade Union Acts from which it can reasonably be inferred that trade unions as defined by Parliament were meant to have the power of collecting and administering funds for political purposes.

A rule which purports to confer on any trade union registered under the Act of 1871 a power to levy contributions from members for the purpose of securing parliamentary representation, whether it be an original rule of the union or a rule subsequently introduced by amendment, is ultra vires and illegal.

Decision of the Court of Appeal, [1909] 1 Ch. 163, affirmed on the above ground by the Earl of Halsbury and Lords Macnaghten and Atkinson; by Lord James of Hereford because one of the rules in question would bind a member of Parliament to answer the whip of the Labour party; and by Lord Shaw of Dunfermline on the constitutional ground that certain rules of the appellants were fundamentally illegal, being in violation of that sound public policy which is essential to the working of representative government.

THE facts relevant to this appeal are stated in the judgment of Lord Atkinson and in the report of the decision of the Court of Appeal.

July 22, 23, 28. *Sir Robert Finlay, K.C., and Peterson, K.C. (P. B. Abraham, Edmond Browne, and Clement Edwards with them), for the appellants.* The application of funds for parliamentary representation was a lawful object of a trade union before the passing of the Trade Union Act, 1871. *Steele v. South Wales Miners' Federation* (1), where Darling and Phillimore JJ. declined to interfere with a levy for the payment of

(1) [1907] 1 K. B. 361.

H. L. (E.)

1909

AMALGA-
MATED
SOCIETY OF
RAILWAY
SERVANTS

v.

OSBORNE.

members to represent the unions, and by which Neville J. felt himself bound, was rightly decided. There is nothing in the Act of 1871 or subsequent legislation to prevent the use of the funds of the union from being applied to this purpose. The Legislature from 1871 removed obstacles to combination which were founded on the old law with respect to restraint of trade. The Trade Union Act of 1871 legalized combinations which but for it "would have been deemed to have been an unlawful combination" as being "in restraint of trade." That definition was enlarged in the Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 16, which defines a trade union as being "any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade." That was an enumeration, not an exhaustive enumeration, of the objects of a trade union. It is not necessary to contend that parliamentary representation is one of the "objects" of a trade union. It is enough to be one of the methods. The legalization of the objects imported the legalization of means ancillary thereto. Trade unions had long been used to approach Parliament for the promotion of their purposes, and the practice was recognized. Granted the premiss that funds may be employed for the purpose of influencing legislation, it must be a question of policy for the union to say how those funds can best be employed. There are many questions among the enumerated objects of the association on which the views of the union had expression in the House of Commons. Among such lawful objects to be promoted may be mentioned the safety of railway traffic and of railway workmen.

There is nothing unlawful in a trade union's carrying on a propaganda. One method of doing so is the voice of members of Parliament. On such matters as an eight hours day, workmen's compensation, conciliation, and arbitration it is proper and desirable that workmen's views should be stated in

Parliament. Trade unions are allowed to appoint agents for many purposes ; some of these may be political. In *Linaker v. Pilcher* (1) Mathew J. held that it was lawful for a newspaper to be supported out of the funds for the advocacy of the union's interests.

On a fair and reasonable construction there was nothing wrong or unlawful in the requirement that candidates should sign and accept the conditions of the Labour party. The words meant that a candidate should be a loyal member of the party. Almost every member of Parliament lies under a similar pledge.

No obligation is imposed on a man to vote against his own conscience. This is shewn by the variety of opinion and of votes among the Labour members themselves. It is unjust to speak of these men as having sold their votes. There is careful choice and scrutiny of the chosen candidates, and absolute freedom of voting. The quotations from Locke, Blackstone, and Burke, however valuable and interesting as political philosophy, are remote from the limited question which this House is called upon to decide.

Jenkins, K.C., and *Spencer Bower, K.C.* (*Stuart Bevan* with them), for the respondent. There is no such distinction applicable here as is suggested between objects and methods. A trade union is a statutory body with statutory powers and subject to statutory limitations. The Amendment Act of 1876 purported to give an exhaustive definition of a trade union. It is not compulsory on a union to register ; but if it is registered, the terms of registration must be strictly complied with. The word " ancillary " is elusive and susceptible of indefinite expansion. Nothing which is illegal as an object can be lawful as a means or method. Nothing is lawful except what is expressly or by fair implication authorized. On like reasoning a brewery company, for example, or any great industrial association might claim the right to have its own parliamentary representatives. The newspaper case, *Linaker v. Pilcher* (1), decided by Mathew J., is not apposite. An incidental purpose can only be served if it is necessary to the realization of the expressed lawful object. Parliamentary representation is remote from the statutory

H. L. (E.)

1909

AMALGA-
MATED
SOCIETY OF
RAILWAY
SERVANTS
v.
OSBORNE.

(1) (1901) 70 L. J. (K.B.) 396.

H. L. (E.)
1909.
~
AMALGA-
MATED
SOCIETY OF
RAILWAY
SERVANTS
v.
OSBORNE.

objects for which trade unions are formed and legalized by the Legislature. There is no authority given by the Legislature for the conversion of a trade union into a political organization. In the case of statutory bodies there are many authorities in this House to the effect that what is not authorized is prohibited. That principle was established in *Ashbury Railway Carriage and Iron Co. v. Riche*. (1)

The strictness with which statutory powers will be construed is illustrated by *London County Council v. Attorney-General* (2); and see *Attorney-General v. Mersey Ry. Co.* (3) Authorities in this House and elsewhere shew that associations or companies in their action and expenditure will be restricted rigidly by the terms of their Acts of Parliament, memorandum of association, or charter: *Eastern Counties Ry. Co. v. Hawkes* (4); *Attorney-General v. Great Eastern Ry. Co.* (5); *Hammersmith Ry. Co. v. Brand* (6); *Baroness Wenlock v. River Dee Co.* (7); *Murray v. Scott* (8); *Great Western Ry. Co. v. Rushout* (9); *Laing v. Reed* (10); *Tomkinson v. South Eastern Ry. Co.* (11); *In re Crown Bank* (12); *Attorney-General v. Manchester Corporation*. (13)

The illegality of the appellants' position may be proved on broader principles. Here there were conditions laid down, a bargain struck and consideration paid for services rendered. Not only the transaction itself but its tendency must be considered. A member of Parliament ought to render a service to his King and country which is unbiassed, uncoerced, incorrupt. The candidate's mind is unduly influenced, his freedom of action destroyed. The law will not countenance conduct in any sphere, whether political or not, which is likely to have such an operation: *Egerton v. Brownlow*. (14)

Sir Robert Finlay, K.C., in reply. There are two principal questions involved which are quite separable from each other. The first is the right to secure parliamentary representation; the

(1) (1875) L. R. 7 H. L. 653.

(2) [1902] A. C. 165.

(3) [1907] A. C. 415.

(4) (1855) 5 H. L. C. 331.

(5) (1880) 5 App. Cas. 473.

(6) (1869) L. R. 4 H. L. 171.

(7) (1885) 10 App. Cas. 354.

(8) (1884) 9 App. Cas. 519.

(9) (1852) 5 De G. & Sm. 290.

(10) (1869) L. R. 5 Ch. 4.

(11) (1887) 35 Ch. D. 675.

(12) (1890) 44 Ch. D. 634.

(13) [1906] 1 Ch. 643.

(14) (1853) 4 H. L. C. at p. 161.

other the pledge exacted from candidates. As to the first, how are the working men to get the expression of their views and the protection of their interests without representation in Parliament? And how can this be done unless the members they elect are paid? It has been suggested that the difficulty should be met by the payment of all members alike by the State. That is a solution from which many, perhaps most men in public life, would shrink as being a degradation. It is common knowledge that many highly respected members of Parliament would never have been able to sit unless they had been paid. The business of life could not be carried on if the extreme doctrines asserted in this appeal were generally accepted. As to the pledge and the party whips the Labour members are not in a different position from other members. It amounts to nothing more than an honourable understanding. Every member has on occasion to reconcile his freedom of action with his party allegiance, and Labour members are in no greater difficulty in this respect than others.

H. L. (E.)

1909

AMALGAMATED
SOCIETY OF
RAILWAY
SERVANTS
v.
OSBORNE.

The House took time for consideration.

Dec. 21. EARL OF HALSBURY. My Lords, I think the decision of this case must depend upon the construction which your Lordships will place upon the statute 34 & 35 Vict., c. 31. In the definition clause of that Act it is enacted that the term "trade union" means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade.

This was amended in the 16th section of the Act 39 & 40 Vict., c. 22, as follows: "The term 'trade union' means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not

H. L. (E.)
1909

AMALGA-
MATED
SOCIETY OF
RAILWAY
SERVANTS
v.
OSBORNE.

Earl of
Halsbury.

been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade."

The 2nd and 3rd sections of the earlier Act protect any purposes of a trade union from being held to be unlawful merely because they are in restraint of trade, with the consequence that no agreement is to be rendered void or voidable. By the 4th section it is provided that nothing in the Act shall enable any Court to entertain any legal proceeding for enforcing or recovering damages for the breach of any agreement between members of the union (1.) concerning the conditions in which they shall or shall not sell their goods, transact business, employ or be employed; (2.) any agreement for the payment by any person of any subscription or penalty to a trade union; (3.) any agreement for the application of the funds of a trade union (a) to provide benefits to members; (b) to furnish contributions to any employer or workman not a member of such trade union in consideration of such employer or workman acting in conformity with the rules and resolutions of such trade union; (c) to discharge any fine imposed upon any person by sentence of a Court of justice.

My Lords, the Act is, as it were, the charter of incorporation, and it undoubtedly renders some things lawful which, but for the enactment, would be unlawful, and with a degree of minuteness gives a specific authority to certain contracts and to certain applications of funds that appear to me to be absolutely exhaustive.

My Lords, the question of how far and to what extent trading corporations were limited by their memoranda of association, which bear a close resemblance to what is here enacted as applicable to trade unions, was very amply discussed in *Ashbury Railway Carriage Co. v. Riche*. (1)

The House of Lords in that case, consisting of Lord Cairns, Lord Chelmsford, Lord Hatherley, Lord O'Hagan, and Lord Selborne, seem to me to have settled the law in a manner which appears to dispose of this case. It is true that the Act does not make the trade union a corporation; but, taking the only

(1) L. R. 7 H. L. 653.

distinctive word used, a "combination," it can hardly be suggested that it legalizes a combination for anything, and if some limit must be placed on its powers, one can only apply the same rules that were agreed to by the noble and learned Lords in that case, and it certainly would not be easy to find a more supreme authority than the judgment in that case.

This statute, I think, gives the charter for all such "combinations," and what is not within the ambit of that statute is, I think, prohibited both to a corporation and a combination; it only exists as a legalized combination having power to act as a person and to enforce its rules within the limits of the statute, whatever those limits are; and in the matter most relevant to the present question it has with great care protected from interference three applications of its funds, among which it is too obvious for argument that the object now in question is not one.

It is manifest, therefore, that, if confined to the three purposes protected by the 4th section, nothing else is within the purposes of a trade union as defined by the 23rd or 16th sections of the two Acts, and it is impossible to uphold this power of taxing the members beyond the purposes for which the trade union exists.

My Lords, you have heard a very learned and interesting argument, itself a commentary upon very learned arguments by the Court of Appeal, and I do not desire to be understood as expressing dissent from the views therein expressed. I only hesitate to give my opinion because I think the views I have expressed upon the construction of the statute are enough to dispose of this case, and I do not desire to go beyond what is necessary for the decision of this case.

Many questions might arise here; for pecuniary assistance might be given to a person who without such assistance might not be able to support the burden of being elected a member of Parliament.

It may be difficult to express in sufficiently definite language how far individual freedom of judgment can be preserved consistently with acceptance of pecuniary support.

I can foresee questions of this sort, and I do not desire to be called upon to decide them until they do arise, and I therefore

H. L. (E.)

1909

AMALGA-
MATED
SOCIETY OF
RAILWAY
SERVANTS

v.

OSBORNE.

Earl of
Halsbury.

H. L. (E.) content myself by saying that this levy is to my mind manifestly beyond the powers possessed by a trade union.

1909

AMALGA-
MATED
SOCIETY OF
RAILWAY
SERVANTS
v.
OSBORNE.

LORD MACNAGHTEN. My Lords, the question which your Lordships are called upon to decide is one of great importance and much interest, but I cannot think that there is any difficulty about it. It seems to me that no conclusion is possible but that which commended itself to the Court of Appeal.

It is a broad and general principle that companies incorporated by statute for special purposes, and societies, whether incorporated or not, which owe their constitution and their status to an Act of Parliament, having their objects and powers defined thereby, cannot apply their funds to any purpose foreign to the purposes for which they were established, or embark on any undertaking in which they were not intended by Parliament to be concerned.

The principle, I think, is nowhere stated more clearly than it is by Lord Watson, in *Baroness Wenlock v. River Dee Co.* (1), in the following passage: "Whenever a corporation is created by Act of Parliament with reference to the purposes of the Act, and solely with a view to carrying those purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions." "That," adds his Lordship, "appears to me to be the principle recognized by this House in *Ashbury Railway Carriage Co. v. Riche* (2) and in *Attorney-General v. Great Eastern Ry. Co.*" (3)

This principle is not confined to corporations created by special Acts of Parliament. It applies, I think, with equal force in every case where a society or association formed for purposes recognized and defined by an Act of Parliament places itself under the Act, and by so doing obtains some statutory immunity or privilege. The law laid down in *Ashbury Railway Carriage Co. v. Riche* (2) "applies," says Lord Blackburn (4), "to all companies created"

(1) 10 App. Cas. 362.

(2) L. R. 7 H. L. 653.

(3) 5 App. Cas. 473.

(4) Ibid. at p. 481.

—I may add or established—“by any statute for a particular purpose.”

The society with which this case is concerned is a trade union registered under the Act of 1871. That Act defines in language amended by the Act of 1876 the purposes of trade unions, and purports to confer certain privileges on unions registered under its provisions.

Whatever may have been the origin of trade unions, it is a matter of common knowledge that many such societies were in existence long before the Act of 1871. Generally speaking, they had two main objects. They were combinations for trade purposes, and for benevolent purposes as well. But when the struggle began which led to the Act of 1871, those who managed the case on the part of trade unions insisted that the benevolent purposes of a union were to be regarded as secondary and subordinate to its trade purposes. They urged, as I ventured to point out in the *Taff Vale Case* (1), that the strength of the union and the confidence of its members simply consisted in this, that it could, if so disposed, employ the whole of its funds in support of trade ends. They objected to any separation of funds as being calculated to paralyse the efficacy of the institution and tantamount to a proposal to suppress unionism by statute. Hence it comes, I think, that the benevolent purposes of trade unions, though referred to in the Trade Union Acts, 1871 and 1876, are not mentioned either in the original or in the amended definition of the term “trade union.” They are relegated to an inferior and subordinate position.

The original definition is, no doubt, open to objection. But the amended definition is, I think, a true definition. When Parliament adopts an expression in common use at the time and assigns to it a particular meaning, it is difficult to see how it can be argued that the expression as used in the Act and for the purposes of the Act does not mean simply that which the Act says it does mean, but means that and anything else in the world not in itself illegal which may be tacked on to it.

Benevolent purposes are recognized in the Trade Union Acts, 1871 and 1876, as objects within the scope and province of trade

H. L. (E.)

1909

AMALGA-
MATED
SOCIETY OF
RAILWAY
SERVANTS
v.
OSBORNE.

Lord
Macnaghten.

(1) [1901] A. C. 437.

H. L. (E.)
1909
AMALGAMATED
SOCIETY OF
RAILWAY
SERVANTS
v.
OSBORNE.
Lord
Macnaghten.

unions. The absence of any reference to such purposes in the definition of the term "trade union" is only noteworthy because it seems to have misled the Divisional Court and was perhaps in some way accountable for the erroneous decision which Neville J. thought himself bound to follow.

There is, I think, an analogy not to be overlooked between the scheme of legislation under which friendly societies and benefit building societies were established and the legislation which contains the charter of trade unionism.

Trade unions desirous of being registered under the Act of 1871 are required to send to the registrar printed copies of their rules. The rules of every such trade union must contain provisions in respect of the several matters mentioned in the First Schedule to the Act. This schedule, it may be observed, refers in the margin to the Friendly Societies Act of 1855 (18 & 19 Vict. c. 63), which, like the Act of 1871, specified the purposes of institutions and societies to which protection was meant to be afforded, and required persons intending to establish a friendly society to agree upon and frame a set of rules "for the regulation government, and management" thereof, and, like the Act of 1871, specified the matters to be provided for by the rules. The first five matters specified in the schedule to the Act of 1871 are word for word the same as the matters to be provided for in the first five rules of the Friendly Societies Act of 1855, merely substituting the word "union" for the word "society." In both cases the rules were to specify "the whole of the objects" of the society or union. But of course the objects to be specified were not, as the Divisional Court thought, any objects not in themselves illegal. They must be objects strictly within the scope of the Act. And the powers to be used in furtherance of those objects (to repeat Lord Watson's words) must be "either expressly conferred or derived by reasonable implication from the provisions of the Act." A power, as Lord Selborne intimated in *Murray v. Scott* (1), may be "not only consistent with but reasonably conducive to the proper objects" of a society, and yet not so necessary as to be implied when not expressly given.

Giffard L.J. pointed out in *Laing v. Reed* (2), in a judgment

(1) 9 App. Cas. 519.

(2) L. R. 5 Ch. 4.

approved by this House in *Murray v. Scott* (1), that in a case like this,—the case of a society owing its constitution and its status to an Act of Parliament and registered under the Act, with rules purporting to be in conformity therewith,—if a controversy arises as to whether a particular rule is or is not ultra vires, the question must be, “Does the rule merely provide a method of conducting business, or is it a rule making the society a thing different from that which is specified in the Act and meant by the Act?”

It can hardly be contended that a political organization is not a thing very different from a combination for trade purposes. There is nothing in any of the Trade Union Acts from which it can be reasonably inferred that trade unions, as defined by Parliament, were ever meant to have the power of collecting and administering funds for political purposes.

The learned counsel for the appellants did not, as I understood their argument, venture to contend that the power which they claimed could be derived by reasonable implication from the language of the Legislature. They said it was a power “incidental,” “ancillary,” or “conducive” to the purposes of trade unions. If these rather loose expressions are meant to cover something beyond what may be found in the language which the Legislature has used, all I can say is that, so far as I know, there is no foundation in principle or authority for the proposition involved in their use. Lord Selborne no doubt did use the term “incidental” in a well-known passage in his judgment in *Attorney-General v. Great Eastern Ry. Co.* (2) But Lord Watson certainly understood him to use it as equivalent to what might be derived by reasonable implication from the language of the Act to which the company owed its constitution; and Lord Selborne himself, to judge from his language in *Murray v. Scott* (1), could have meant nothing more.

I am therefore of opinion that a rule which purports to confer such a power as that now in question on any trade union registered under the Act of 1871, whether it be an original rule of the union or a rule subsequently introduced by amendment, must be ultra vires and illegal.

(1) 9 App. Cas. 519.

(2) 5 App. Cas. 473.

H. L. (E.)

1909

AMALGA-
MATED
SOCIETY OF
RAILWAY
SERVANTS
v.
OSBORNE.

Lord
Macnaghten.

This view, which is, I think, in accordance with the opinion of all the learned judges in the Court of Appeal, disposes of the whole case. I do not think it is necessary, and I doubt whether it is expedient or profitable, to discuss the so-called constitutional question which was introduced, rather unfortunately I think, into the case in the Court of Appeal.

I may, however, perhaps be forgiven for referring to an historical fact which is (to borrow a phrase from a Lord Chancellor of former times) "more matter of curiosity than use." It seems pretty clear that at the date of the passing of the Act of 1871 trade unions were by no means ambitious of parliamentary representation or political power. Some of the most respected leaders of trade unionism held the view that the less trade unions had to do with politics the better. It was not until two or three years after the passing of the Act of 1871 (as appears from Mr. and Mrs. Webb's able and exhaustive History of Trade Unionism) that the scheme for securing parliamentary representation and obtaining political power first took shape and met with acceptance among trade unionists.

I think the decision of the Court of Appeal must be maintained and the appeal dismissed with costs.

LORD JAMES OF HEREFORD. My Lords, after much consideration I have come to the conclusion that your Lordships' judgment should be given in favour of the respondent. But I desire to explain that the opinion I thus express is founded upon one particular fact existing in the case.

With much of the argument adopted by counsel at the bar on behalf of the appellants I agree. For instance, I think it may well be in the interests of trade unionism and labour that the funds of a trade union should be devoted to the payment of the expenses of a member of Parliament, who should represent such interests.

I also concur in the view presented to your Lordships by Sir Robert Finlay, that s. 16 of the Act of 1876 is not a clause of limitation, or exhaustive definition. It seems to me that the Legislature only intended to require certain qualifications to exist before an entity could become a trade union, but the

objects or limits of action of a properly qualified trade union are not dealt with by the section.

So far I am in agreement with the case presented by the appellants. But my difficulty in the way of complete concurrence arises in consequence of the terms of rule xiii., section 4, as amended in October, 1906: "All candidates shall sign and accept the conditions of the Labour party and be subject to their 'whip.'"

The effect of this rule and others that exist is that a member of the trade union is compelled to contribute to the support of a member of Parliament, who is compelled "to answer the whip of the Labour party." I construe this condition as meaning that the member undertakes to forgo his own judgment, and to vote in Parliament in accordance with the opinions of some person or persons acting on behalf of the Labour party. And such vote would have to be given in respect of all matters, including those of a most general character, such as confidence in a Ministry or the policy of a Budget—matters unconnected, directly at least, with the interests of labour. Therefore I am of opinion that the application of money to the maintenance of a member whose action is so regulated is not within the powers of a trade union.

If your Lordships decide on this branch of the case that the respondent is entitled to judgment, it is unnecessary that any opinion should be expressed upon the very broad constitutional question raised for the first time in the Court of Appeal affecting the general support of members, and upon which the President of the Court, the Master of the Rolls, has given no judgment. However, I desire to add that my silence upon this question of the judgment of the two Lords Justices must not be regarded as denoting agreement with it.

LORD ATKINSON. My Lords, in this case the plaintiff sues a trade union society duly registered, of which he has been continuously a member since the year 1892, to have it declared that rule xiii., section 4, of its current rules, which provides, amongst other things, for parliamentary representation and the enforced levy of contributions from the plaintiff and other members of the society towards the payment of salaries, or maintenance

H. L. (E.)

1909

AMALGAMATED
SOCIETY OF
RAILWAY
SERVANTS
v.
OSBORNE.

Lord James of
Hereford.

H. L. (E.) allowance, to members of Parliament pledged to observe and fulfil
 1909 the conditions imposed by the constitution of the Labour party
 AMALGA- therein referred to, is ultra vires and void, and that the society
 MATED may be restrained from enforcing it, and in the alternative
 SOCIETY OF that it may be declared that a certain amendment or addition
 RAILWAY made to the rules in 1906 may be declared to be illegal and void,
 SERVANTS v. and for other relief.
 OSBORNE.

Lord Atkinson. The registered rules of 1900 were, for the purpose of the
 hearing, taken as the original rules of the society, though it had
 in fact been established in 1871.

Under the provisions of the 14th section of the Trade Union
 Act of 1871 and the schedule therein referred to, those rules
 must have provided for the "whole of the objects" for which
 the union was established, "the purposes for which the funds
 were to be applicable," "the conditions under which any member
 might become entitled to the benefit assured thereby," and "the
 fines and forfeitures to be imposed on any member."

It was conceded that these rules of 1900 did not contain any
 reference whatever to parliamentary representation, or to levies
 in respect of it; that in 1903, for the first time, there was intro-
 duced into the rules, by amendment, the words "to secure
 parliamentary representation" to designate a purpose to which
 funds might thereafter be applied; and that in 1906 an amend-
 ment was for the first time introduced requiring candidates for
 Parliament to sign and "accept the conditions of the Labour
 party and be subject to their 'whip.'"

As the plaintiff had become a member of the society long
 before these amendments were made, it is conceded that, if they
 are illegal or void as being ultra vires, he has not contracted to
 be bound by them, as he might possibly be held to have done
 had they been made before he became a member, and that,
 therefore, if his objection to the amendments be well founded,
 he is within his rights in bringing this action and is entitled to
 the main relief he seeks. One question, called for convenience
 "the constitutional question," was argued before your Lord-
 ships which was not argued before Neville J. It is not
 specifically raised on the pleadings, nor, as far as appears from
 the record, was it ever, until the hearing of the appeal, thought

of by the parties to the suit. It is the question whether the members of Parliament who receive salaries or maintenance allowances and sign the pledge to accept the conditions contained in the constitution of the Labour party, referred to in the rules of 1906, and to be subject to their whip, have not thereby entered into an agreement which involves such a sacrifice of their independence and liberty of thought and action that it is illegal and void as against public policy.

On the other hand, some questions were argued before the Court of Appeal which were not argued, or not pressed, before your Lordships. First, it was not contended here, as it was there, that the amended rules, whatever their imperfections in law, were validated by registration. Second, the alleged incompetency of the general meeting which adopted the amendment of 1906, due to the conditions under which it was convened, was not pressed on the respondent's behalf.

The questions argued before your Lordships are thus reduced to two—first, whether or not the rule complained of was ultra vires; and, second, the so-called “constitutional question.” Holding the views I am about to express upon the first question, it is entirely unnecessary for me to express any opinion whatever upon the second, and I abstain from doing so.

The contentions relied upon to establish the validity of the impeached rule are, as I understand it, first, that the definition contained in clause 16 of the Trade Union Amendment Act of 1876 is not, as it is said, exhaustive, and that therefore a trade union, though registered, may have amongst its objects, in addition to one or more of the objects named in the section, any object whatever not in itself illegal, and accordingly that, provided it be created to effect one or more of the objects named, it is in other respects in the same position as any individual or voluntary association of individuals, and is therefore at liberty to expend its funds to procure the return of members of Parliament, and to maintain them there, as freely as an individual or such an association of individuals is to devote his or its moneys to a like purpose; and, second, that, even if such a union be not free to aim at all legal objects not named in the section, parliamentary representation, on the conditions prescribed in the rule, is the

H. L. (E.)

1909

AMALGA-
MATED
SOCIETY OF
RAILWAY
SERVANTS
v.
OSBORNE.

Lord Atkinson.

H. L. (E.) 1909
 ———
 AMALGAMATED
 SOCIETY OF
 RAILWAY
 SERVANTS
 v.
 OSBORNE.
 ———
 Lord Atkinson.

most effective means of attaining the objects which are named, and may therefore be lawfully provided for in the mode prescribed.

The ground upon which it is insisted that the definition is not exhaustive is this. The definition, it is said, contains no reference to the providing of benefits for members, &c., though it is obvious, from the provision of s. 4 of the Act of 1871 and of the First Schedule referred to in that statute, that this was one of the well-known purposes for which trade unions were formed.

Farwell L.J. was apparently of opinion that the provision of such benefits is covered by the words in the definition, "regulating the relations between workmen and workmen"; but, whether that be so or not, the providing of benefits was a well-known and well-recognized purpose of trade unions long before any legislation dealing with them was passed. It is undoubtedly a purpose collateral or ancillary to the purposes with which the section is conversant; and to argue that because of the omission from this section of a well-known object of this kind therefore all objects not named, however foreign they may be to those objects at which the history of these bodies shews they aimed, may legitimately be promoted is the most obvious non sequitur.

Sir George Jessel in *Rigby v. Connol* (1) analysed the legislation passed to deal with trade unions and described its purpose and effect. Farwell L.J. in his judgment in this case described with accuracy and fulness their present position, their rights and privileges. From these judgments it is clear, in my view, that they are, when registered, quasi-corporations, resembling much more closely railway companies incorporated by statute than voluntary associations of individuals merely bound together by contract or agreement, express or implied. And it is plain that, as soon as this character was given to them, and the rights and privileges they now enjoy were conferred upon them, it became a matter of necessity to define the purposes and objects to which they were at liberty to devote the funds raised from their members by enforced contributions. A definition which permitted them to do the particular things named and in

(1) (1880) 14 Ch. D. at p. 489.

addition all things not in themselves illegal would be no definition at all and would serve no purpose at all. There must be some limit. The question for decision, therefore, is whether parliamentary representation falls within or without that limit, or, in other words, whether the Legislature, expressly or by fair implication, has conferred upon registered trade unions power and authority to subsidize, in the manner provided by the impeached rule a scheme of parliamentary representation. I use the expression "by fair implication" as that was the expression used by Lord Watson in *Attorney-General v. Great Eastern Ry. Co.* (1) in applying the ultra vires rule to railway companies incorporated by an Act of Parliament. He expresses himself thus: "I cannot doubt that the principle by which this House, in the case of the Ashbury Railway Carriage Company, tested the power of a joint stock company (with limited liability) under the Companies Act of 1862 applies with equal force to the case of a railway company incorporated by an Act of Parliament. That principle in its application to the present case appears to me to be this, that when a railway company has been created for public purposes the Legislature must be held to have prohibited every act of the company which its incorporating statute did not warrant either expressly or by fair implication."

And Lord Blackburn, in dealing with corporations having the powers of common law corporations to contract under seal, lays down the rule by which their action in that respect is to be limited on somewhat the same lines. In his judgment in *Riche v. Ashbury Railway Carriage Co.* (2) he is reported to have expressed himself thus: "I do not entertain a doubt that, if on the true construction of a statute creating a corporation it appears to be the intention of the Legislature, express or implied, that the corporation should not enter into a particular contract, every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void."

Lord Cairns, in his judgment in that case in the House of Lords (3), approves apparently of the statement of the rule. In

H. L. (E.)
1909
AMALGAMATED
SOCIETY OF
RAILWAY
SERVANTS
v.
OSBORNE.
Lord Atkinson.

(1) 5 App. Cas. 473, at p. 486.

(2) L. R. 9 Ex. at p. 262.

(3) L. R. 7 H. L. 653, 673.

H. L. (E.) an earlier portion of his judgment he pointed out that limited liability companies created under the Companies Act of 1862 had not the powers of common law corporations, and gave the reasons why their operations must be restricted to those subjects expressly or impliedly mentioned in their memoranda of association.

1909
AMALGAMATED
SOCIETY OF
RAILWAY
SERVANTS
v.
OSBORNE.
Lord Atkieson.

It is not suggested that registered trade unions have the powers of common law corporations, and the rule to be applied to them must, I think, be that laid down as applicable to railway companies in the above quoted passage from Lord Watson's judgment. Now it is not contended that it is a matter of necessity for registered trade unions to secure parliamentary representation on the lines indicated in this rule, or on any other lines. Their whole history refutes such a suggestion. But it is contended that it is only fair to imply that they have this power, because such a representation would afford the most effective means of accomplishing the objects mentioned in s. 16, inasmuch as legislation might be introduced to help or hinder them in the prosecution of those objects, and that it is vital to their interests to have in Parliament members in sympathy with their views to support the one form of legislation and to oppose the other; and, further, that they cannot procure the return of such members unless they pay out of their funds the election expenses of chosen candidates, and by the same means maintain them if returned to Parliament.

The answer to that argument is, I think, this. Trade unions are in this respect in precisely the same position as all corporations, municipal or commercial, including in the latter all limited liability companies created under the Act of 1862. These bodies, like the trade unions, may by legislation be helped or hindered in carrying out the objects which they were formed to carry out. Their most vital interest may be seriously prejudiced by taxation which the Legislature may impose, or enabling statutes, general in character, may be introduced calculated to enlarge their powers, increase their privileges, or remove restraints upon their action, or again some of them may be under the necessity of promoting private Bills to meet their own special needs. If, despite all this, the intention never has been and cannot be

imputed to the Legislature to confer upon such corporations as these power or authority to devote their funds to the procurement of parliamentary representation in the manner in this case contended for, how can such an intention be imputed to it in the case of quasi-corporations such as registered trade unions? And if this intention cannot be imputed to the Legislature in the case of registered trade unions, as in my view it cannot be, there can be no such thing as an implied grant of the desired powers, because an addition to a grant is only introduced by implication in order to carry out the presumed intention of the grantor. During the argument I asked to be informed on what principle the case of registered trade unions was to be differentiated from that of other corporations such as I have named, and why the former were to be permitted, by an alteration of their rules, to convert themselves into political organizations, while a similar privilege was to be denied to the latter. No satisfactory reply was given to me, because none could, I believe, be given. I know of no such principle myself.

It is not disputed that up to 1903, at all events, members of trade unions were not on joining required to subscribe to any political creed, or submit to any political test, no more than are persons who become shareholders in a railway company, and, for all that appears, there may be as great a diversity of political views amongst the members of the one class as of the other. Freedom of opinion was probably permitted amongst the members of both classes because it was not the business of either of the bodies to which they respectively belonged to support particular political parties or to promote a particular political policy. It would be as unjust and oppressive as, in my view, it is illegal to compel, by passing rules such as that impeached, a member of a trade union, who like the respondent joined in the days when freedom of action was permitted, either to contribute to the promotion of a political policy of which he might possibly disapprove, or be expelled from the union to which he belonged for so many years and forfeit all benefit from the money he had subscribed.

I am therefore of opinion that power and authority such as are in this case claimed for the appellants have not been

H. L. (E.)

1909

AMALGAMATED
SOCIETY OF
RAILWAY
SERVANTS
v.
OSBORNE.

Lord Atkinson.

H. L. (E.) 1909
 AMALGAMATED SOCIETY OF RAILWAY SERVANTS v. OSBORNE.

conferred upon them expressly or by implication; that the impeached rule is ultra vires; that the decision appealed from was on this point right and should be upheld, and the appeal dismissed with costs. For the reasons already given I express no opinion on the other question so elaborately argued before your Lordships by Mr. Spencer Bower.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with the narrative which appears in the judgments of your Lordships who have preceded me as to the statutes and the rules of the appellant society which bear upon the points open for decision in this case, and as to the relations and actings of the society and the respondent. I think it unnecessary to make any restatement on those subjects.

The respondent became a member of the appellant society sixteen years ago. Its rules were amended from time to time. During those years he had on the one hand made his contributions, and on the other hand was entitled to the benefits provided by the union. His rights and contributions, however, were liable to forfeiture if he should fail in making payment of such contributions or levies as were duly and regularly imposed. It is conceded that the object for which such contributions or levies are imposed must be (1.) within the terms of the contract, that is to say, within the scope, express or implied, of the rules and objects of the union, and (2.) within the law, that is to say, for purposes which are not in themselves illegal, unconstitutional, or contrary to public policy.

These propositions are not confined to trade unions, benefit societies, or the like, but would similarly extend to unions or federations of employers, and indeed, in principle, to all bodies or companies acting in terms and for objects set forth in a voluntary code or in a statutory enactment. This is, of course, subject to the express or implied powers of development and adaptation deducible from the code. What the latter are is a question in each individual case. In the present case it has been argued to us with great force that the union, one of whose objects, for instance, is "to improve the condition and protect the interests of its members," &c., must have (since the action

of Parliament may have the greatest influence in achieving those objects) an implied power to include the payment of members of Parliament within the scope of its powers of expenditure and levy, fortified as those powers are by the sanction of forfeiture of rights.

My doubt has reference to the scope of and the point selected for decision in this case, and it arises in this way. There were two arguments presented. (1.) The expenditure of the society's members' contributions in paying members of Parliament, whether the payments be part of an illegal or unconstitutional compact or not, is not in fact authorized by the terms of association. (2.) The payment in respect of which the contributions are enforced, whether such payment be authorized by the terms of the association or not, is part of a compact which in its nature is illegal or unconstitutional.

Under the first argument, if the contravention of the terms of association be affirmed, the constitutional question is superseded. Under the second argument, if essential illegality be affirmed the consideration of the terms of association is unnecessary.

My Lords, in the Court of Appeal the learned Master of the Rolls decided only the first and the learned Lords Justices Fletcher Moulton and Farwell decided both of those questions. I should have been very glad if your Lordships had also seen your way to adopt the latter course. But I quite agree that, strictly considered, the one question saves the other. As so often happens with propositions so related, the selection between them is not governed by any canon of logic, but is optional.

Your Lordships' choice has fallen on the point as to the rules and objects of the society, which I gather that you hold did not embrace the payment of members of Parliament. My Lords, I cannot say that I am entirely clear in my own mind upon that topic. I do not dissent, but I do not decide. Long before the statutes of 1871 and 1876 were enacted trade unions were things in being, the general features of which were familiar to the public mind. They were associations of men bound together by common interests for common ends. Statute did not set them up, and, speaking for myself, I have some hesitation in so construing language of statutory recognition as a definition imposing

H. L. (E.)

1909

AMALGAMATED
SOCIETY OF
RAILWAY
SERVANTS

v.

OSBORNE.

Lord Shaw of
Dunfermline.

H. L. (E.)

1909

AMALGA-
MATED
SOCIETY OF
RAILWAY
SERVANTS
v.
OSBORNE.

Lord Shaw of
Dunfermline.

such hard and fast restrictive limits as would cramp the development and energies and destroy the natural movements of the living organism. It is in that region that my doubts lie. I fully recognize that the introduction of matter either foreign to or subversive of the society's objects is not permissible; but I am not clear that the payment of members of Parliament by associations whose objects embrace the regulation of hours and conditions of labour and of the relations of the employers and workmen is such foreign or subversive matter; and, speaking for myself, I do not think that the problem is solved by designating the new matter political and holding that for that reason it is differentiated from the old.

It is in these circumstances, my Lords, that I find myself compelled to consider this appeal upon the other ground taken, involving an examination of the conditions which accompany the payment under the constitution of the Labour party, namely, the ground that the contributions are to be devoted to the payment of members of Parliament, who accept the same under obligations inconsistent with our parliamentary constitution and contrary to public policy. As, however, my Lords, I stand alone in this course, and as accordingly my view would not be considered as entering into the ratio of the judgment of your Lordships' House as a whole, I shall content myself with a brief statement. This is the more justified on account of the fulness and learning and power with which the point has been treated by Fletcher Moulton L.J. and Farwell L.J. in the Court of Appeal.

I do not accordingly think it necessary to deal with the whole chain of authorities cited in the able and instructive argument of Mr. Spencer Bower; but I may be allowed to put on record what I conceive to be the substance of the case submitted upon the constitutional point. And I do so for the further reason that I incline to the opinion that that portion of the case is of general and permanent, while the other point now decided may, for reasons which need not be entered upon, be of particular and relatively transient importance.

On October 1, 1906, the annual general meeting of the appellant society adopted a "partial alteration of rules" as

follows: To rule xiii., section 4, clause 2, paragraph (a), add "all candidates shall sign and accept the conditions of the Labour party and be subject to their 'whip'." "New clause 7. The executive committee shall make suitable provision for the registration of a constituency represented by a member or members who may be candidates responsible to and paid by this society." Stripped of extraneous matter, it is the competency and legality of these additions which are the questions at issue in this suit.

"The conditions of the Labour party" are to be found (along with its composition) in the document entitled "Constitution of the Labour Party (as revised under the authority of the London Conference, 1906)." The body is a federation of trade unions, trade councils, Socialist societies, and local labour associations, who may become affiliated on application. Co-operative societies are also eligible. Its first object is "to organize and maintain a parliamentary Labour party with its own whips and policy." That policy is presumably formulated and controlled by the annual conference of delegates. It should here be explained that the Labour party appears to be the lineal successor of the Labour Representation Committee, whose constitution, as revised in January, 1905, is also printed. The constitution of the Labour party differs in some respects from that of the Labour Representation Committee, and the difference is especially notable in regard to the delegates and the annual conference. By the constitution of the Labour party, trade unions and Socialist societies pay 15s. per annum for every 1000 members, and receive one voting card for each 1000 or fraction thereof paid for. On the other hand, trade councils and local labour associations pay 1*l.* 10s. per annum, irrespective of membership, and are entitled to send one delegate to the annual conference. "But they may send one additional delegate for every additional 10s. paid as affiliation fee," and they are entitled to receive one voting card, not for each 1000 members, but for each delegate they are entitled to send. How this works in practice is not stated, but it appears to be possible that the annual conference, which constitutes the ultimate governing body, may be composed according to money contributions by

H. L. (E.)

1909

AMALGA-
MATED
SOCIETY OF
RAILWAY
SERVANTS
v.
OSBORNE.

Lord Shaw of
Dunfermline.

H. L. (E.)
 1909
 ~~~  
 AMALGA-  
 MATED  
 SOCIETY OF  
 RAILWAY  
 SERVANTS  
 v.  
 OSBORNE.

Lord Shaw of  
 Dunfermline.

trade councils and local labour associations in such a way as to swamp the larger component organizations, including the Amalgamated Society of Railway Servants, whose representation is confined to one voting card per 1000 members. The case, therefore, is not simply that of contributions for payment of members of Parliament to be selected and supported by the appellant society itself, but one in which, while the duty of support is laid on the society, the securing of the election of the member and the parliamentary policy which he is bound to pursue is controlled by another body, a federation of societies, to whom the appellant society has consented to delegate these important functions, in which federation the opinions of the appellant society may be merged or submerged, as the case may be. While a delegation of this kind is undoubtedly of a most serious character, no separate point on that subject was taken in debate, and for myself I decide the case apart from it.

An executive of the Labour party is appointed, among whose duties is to "issue a list of its candidates" and recommend them for the electors' support, and to report to the affiliated organization "any Labour member, candidate, or chief official, who opposes a candidate of the party or acts contrary to the spirit of this constitution." As to candidates and members of Parliament themselves, the constitution is in these terms: 1. "Candidates and members must accept this constitution; agree to abide by the decisions of the parliamentary party in carrying out the aims of this constitution; appear before their constituencies under the title of Labour candidates only; abstain strictly from identifying themselves with or promoting the interests of any party not eligible for affiliation; and they must not oppose any candidate recognized by the executive committee of the party."

The position of a member of Parliament supported by the contributions of the society is accordingly this. As stated, (1.) he is by the society's rules "responsible to" as well as paid by the society; (2.) he must have as a candidate signed and accepted the conditions of the Labour party; (3.) while that party has its own policy he must accept its constitution, and "agree to

abide" by the decisions of the parliamentary party in carrying out the aims of the constitution. Under these aims the first object of the constitution must be included, namely, maintaining the Parliamentary Labour party's own policy. Unless a member becomes bound to the society and to the Labour party by these conditions, and shapes his parliamentary action in conformity therewith, and with the decisions of the parliamentary party, he has broken his bargain. Take the testing instance: should his view as to right and wrong on a public issue as to the true line of service to the realm, as to the real interests of the constituency which has elected him, or even of the society which pays him, differ from the decision of the parliamentary party and the maintenance by it of its policy, he has come under a contract to place his vote and action into subjection not to his own convictions, but to their decisions. My Lords, I do not think that such a subjection is compatible either with the spirit of our parliamentary constitution or with that independence and freedom which have hitherto been held to lie at the basis of representative government in the United Kingdom.

It is no doubt true that a member, although party to such a contract of subjection, would in point of law enter Parliament a free man, because the law would treat as non-enforceable and void the contract which purported to bind him. And it is no doubt true that—parties remaining outside of and making no appeal to the law—this subjection may arise in practice through the operation upon certain natures of various motives, including notably those of sycophancy or fear. But when the law is appealed to to lend its authority to the recognition and enforcement of a contract to procure subjection of the character described, with the concurrents of money payments and the sanctions of fines or forfeitures, the law will decline such recognition or enforcement because the contract appealed to is contrary to sound public policy.

I should be sorry to think that these considerations are not quite elementary. And they apply with equal force not to labour organizations alone, which operate by administering—under, it may be, careful supervision—the subscriptions of its members, but with even greater force to individual men, or

H. L. (E.)

1909

AMALGA-  
MATED  
SOCIETY OF  
RAILWAY  
SERVANTS  
v.  
OSBORNE.

Lord Shaw of  
Dunfermline.



H. L. (E.)  
1909  
—  
AMALGA-  
MATED  
SOCIETY OF  
RAILWAY  
SERVANTS  
v.  
OSBORNE.

Lord Shaw of  
Dunfermline  
—

organizations or trusts of men using capital funds to procure the subjection of members of Parliament to their commands. In this latter case, indeed, adhesion to the principle is of a value all the greater because its violation might be conducted in secret. It needs little imagination to figure the peril in which parliamentary government would stand if, either by the purchase of single votes, or by subsidies for regular support, the public well-being were liable to betrayal at the command and for the advantage of particular individuals or classes.

It would be superfluous to note in detail how deeply embedded this principle is in the law of England on the subject of parliamentary government. On the subject of the predominating consideration Coke remarks (4 Inst. 14), "And it is to be observed, though one be chosen for one particular county or borough, yet when he is returned and sits in Parliament he serveth for the whole realm."

Blackstone in the passage cited in the Court below adopts the same language, and Locke's well-known view in his second Essay on Civil Government is stamped with the authority of the great commentator.

For my part, I look upon the whole of this doctrine as necessarily flowing from the fundamental idea that Parliament, originally conceived as a body of advisers to the King, is free—free in its election and free also in its advice. This fundamental idea of freedom has stood upon the Statute Book for many centuries. By 3 Edw. 1, c. 5, it was enacted: "And because elections ought to be free, the King commandeth upon great forfeitures that no man by force of arms, nor by malice or menacing, shall disturb any to make free election." Of this statute, which Coke describes as "excellently penned," he comments: "Now that electors might make free and due elections without displeasure or fear thereof, by Act of Parliament, as a sure defence, the King commandeth the same, upon grievous forfeiture." Another early and most cogent illustration is that of 7 Hen. 4, c. 15, whereby it was provided that knights of shires for the Parliament were to be chosen "*libere et indifferenter sine prece aut precepto*."

It is no doubt true, my Lords, that the public records and the

Statute Book shew that the protections which were thrown around freedom were largely in the shape of securing the safety of electors and constituencies in the exercise, without interruption, constraint, or corruption, of the franchises they enjoyed. But all this would have been a mockery if, after purity and freedom had been enjoined amongst electors and constituencies, the representative so elected was not himself to be in the possession of his freedom in vote, advice, and action—not to be free, but to be bound, bound under a contract, to submit these, for salary and at peril of loss, to the judgment of others. Locke clearly discerned the interrelation of these two things. The latter, as well as the former, is ranked among those breaches of trust which would amount to the very dissolution of government. The former is dealt with in the phrases as to the action of the magistrate, “if he employs the force, treasure, and offices of the society to corrupt the representatives or openly to pre-engage the electors, and prescribe what manner of persons shall be chosen. For thus to regulate candidates and electors and new model the ways of election, what is it but to cut up the Government by the roots, and poison the very fountain of public security.” The latter is dealt with in the remainder of the same sentence as follows: “For the people having reserved to themselves the choice of their representatives, as the fence to their properties, could do it for no other end but that they might always be freely chosen, *and so chosen freely act and advise*, as the necessity of the commonwealth and the public good should upon examination and mature debate be judged to require.”

These principles have been frequently subject to evasion and attack, sometimes open and sometimes secret, but they have never been overthrown; and they apply to labourists' men, to capitalists' men, or, as in former times, to King's men. Whether they form one of the chief glories of the Constitution, making this island “the envy of less happier lands,” may be treated by the constitutional historian; with that I have not here to do; but in my opinion they do form part of the very body of our public law.

Granted, however, that no conditions are imposed subversive of or imperilling their freedom, it will be observed that nothing

H. L. (E.)

1909

AMALGA-  
MATED  
SOCIETY OF  
RAILWAY  
SERVANTS  
v.  
OSBORNE.

Lord Shaw of  
Dunfermline.

H. L. (E.) that has been said attaches a taint or shadow of illegality to the payment of members of Parliament. Such payment may be a tribute to character, or a recognition of talent, coupled with a desire that these should be secured for the service of the State, or it may spring from a legitimate wish that the views, the needs, the perils of particular, and it may be large, classes of His Majesty's subjects should be expressed in Parliament by those who speak with the authority of practical experience.

1909  
 AMALGAMATED  
 SOCIETY OF  
 RAILWAY  
 SERVANTS  
 v.  
 OSBORNE.  
 Lord Shaw of  
 Dunfermline.

Thus far I accede to the powerful argument for the appellants. But when that argument was pushed further, and especially to the two steps now to be noted, I must decline my assent. (1.) It was said that experience shews that men of high honour have felt themselves free to accept obligations similar to those contained in the constitution of the Labour party, and that those obligations have not in practical life proved restraints upon their independence, or manacles upon their judgment. It may be that this is so, and its accord with one's experience of such men makes the argument strong; and it may also be that in such individual cases men stand so deservedly high in the councils of the controlling party that no dissonance between their views and its views will in practice arise. All this within the voluntary sphere is powerful. But in my opinion such instances should not be allowed as an argument for legalizing the obligations of subjection to which I have referred, or for imperilling the broad constitutional guarantees of freedom. (2.) It was argued that if individual classes were not to be allowed on their own terms to make payment of members of Parliament their security from the possible dangers of such operations could only be obtained at too high a price, namely, the payment of members as of right and from the public treasury. I do not think such considerations clarify the legal solution or should weigh with a Court of law.

In brief, my opinion accordingly is: The proposed additional rule of the society that "all candidates shall sign and respect the conditions of the Labour party, and be subject to their 'whip,'" the rule that candidates are to be "responsible to and paid by the society," and, in particular, the provision in the constitution of the Labour party that "candidates and

members must accept this constitution, and agree to abide by the decision of the parliamentary party in carrying out the aims of this constitution," are all fundamentally illegal, because they are in violation of that sound public policy which is essential to the working of representative government.

Parliament is summoned by the Sovereign to advise His Majesty freely. By the nature of the case it is implied that coercion, constraint, or a money payment, which is the price of voting at the bidding of others, destroys or imperils that function of freedom of advice which is fundamental in the very constitution of Parliament. Inter alia, the Labour party pledge is such a price, with its accompaniments of unconstitutional and illegal constraint or temptation.

Further, the pledge is an unconstitutional and unwarrantable interference with the rights of the constituencies of the United Kingdom. The Corrupt Practices Acts, and the proceedings of Parliament before such Acts were passed, were but machinery to make effective the fundamental rule that the electors, in the exercise of their franchise, are to be free from coercion, constraint, or corrupt influence; and it is they, acting through their majority, and not any outside body having money power, that are charged with the election of a representative, and with the judgment on the question of his continuance as such.

Still further, in regard to the member of Parliament himself, he too is to be free; he is not to be the paid mandatory of any man, or organization of men, nor is he entitled to bind himself to subordinate his opinions on public questions to others, for wages, or at the peril of pecuniary loss; and any contract of this character would not be recognized by a Court of law, either for its enforcement or in respect of its breach. Accordingly, as it is put in the words of Fletcher Moulton L.J., "Any other view of the fundamental principles of our law in this respect would, to my mind, leave it open to any body of men of sufficient wealth or influence to acquire contractually the power to exercise that authority to govern the nation which the law compels individuals to surrender only to representatives, that is, to men who accept the obligations and the responsibility of the trust towards the public implied by that position."

H. L. (E.)

1909

AMALGA-  
MATED  
SOCIETY OF  
RAILWAY  
SERVANTS  
v.  
OSBORNE.

Lord Shaw of  
Dunfermline.





Shettleston, near Glasgow. The respondents and defenders were the Budhill Coal and Sandstone Company and others. H. L. (Sc.)

1909

NORTH  
BRITISH  
RAILWAY  
v.  
BUDHILL  
COAL AND  
SANDSTONE  
COMPANY.

The lands of Shettleston were acquired by the appellants from the respondents William Mather and others or their predecessors in title at various dates between 1869 and 1876 for the purposes of the appellants' railway. These lands were shewn coloured brown, crimson, pink, and red on a plan. The lands coloured brown and crimson were acquired under statutory conveyances in terms of the Railways Clauses Consolidation (Scotland) Act, 1845, and in virtue of s. 70 of that Act there were excepted from these conveyances "all mines of coal, ironstone, slate or other minerals under the land thereby conveyed." (1) The lands coloured pink were acquired by the appellants' predecessors under a conveyance from which were excepted the "whole coal, ironstone, limestone, and fireclay and whole other metals and minerals in the lands . . . with full power and liberty to those in right thereof . . . to search for, work, win and carry away the same, so far as not already done, but so as not to enter upon the surface of said lands." Under the said conveyance the appellants were entitled to compensation for damages to the land thereby disposed by the working of any minerals thereunder. The lands coloured red were acquired by the appellants' predecessors under a conveyance containing the following reservation: "Reserving always from this conveyance the whole coal mines and minerals in and under the piece of ground hereby disposed and full right and liberty to work the same, but only by pits sunk outside of the piece of ground hereby disposed and subject to and in terms of the provisions of the Railways Clauses Consolidation (Scotland) Act, 1845."

The action was brought (1.) against the Budhill Coal and Sandstone Company, the lessees, whose business has since the raising of the action been acquired by the Budhill Coal and Sandstone Company, Limited, added as defenders, and (2.) against William Mather, Reston Mather, and James Mather. The Mathers are the present proprietors of the lands adjoining the property of the appellants, coloured blue on the plan, and were also the grantors or the successors of the grantors of the above-mentioned

(1) See Lord Gorell's opinion for the full section.

H. L. (SC.)  
 1909  
 ———  
 NORTH  
 BRITISH  
 RAILWAY  
 CO.  
 v.  
 BUDHILL  
 COAL AND  
 SANDSTONE  
 COMPANY.  
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conveyances, and, further, were proprietors of the subjects excepted by statutory implication or express reservation from the conveyances in favour of the appellants. The respondents first named claim to be lessees under the Mathers of "the freestone metals and all other minerals within a depth of 120 feet from the surface" both in the area coloured blue and in (inter alia) the areas coloured brown, crimson, pink, and red on the said plan, and also of the surface of the area coloured blue, in virtue of a lease dated December 18, 1905.

The proximate cause of the action was a notice served by the lessees on the appellants intimating in terms of the Railways Clauses Consolidation (Scotland) Act, 1845, s. 71, that they intended after the lapse of thirty days from the service of the notice to work "the minerals" contained in their lease under a portion of the appellants' railway, "it being their intention (without prejudice to their right to vary the order of working) to commence to work the sandstone at or near" a stated point, "and to work it in a northerly and north-westerly direction and in a south-easterly direction, the seam of sandstone being about twelve feet thick, and thereafter to work the building rock underlying the said sandstone, and thereafter the seam of coal thereunder known as the Glasgow upper coal seam, and the fire-clay associated therewith, the said upper seam including fireclay being approximately six feet thick."

The appellants did not serve a counter-notice on the lessees, and shortly after the service of the said notice the lessees began to excavate an inclined underground shaft in the lands coloured blue, and (condescendence 5) drove "mines from such excavation into and under the lands of the" appellants, "and have worked and removed and are working and removing from under the said lands" certain substances. The respondents answered (condescendence 5): "The workings are in an upper part of a stratum of sandstone about forty feet in thickness which extends generally below all the surface of the properties coloured blue, brown, crimson, pink, red, and purple. A bore put down in the north-east corner of the ground coloured blue shews that on the surface there are three feet of soil and then about eight feet of brown clay, and then four feet of hard white sandstone

and then eight feet of hard white sandstone shading into grey, then fourteen feet of fine grey sandstone, then again about thirteen feet of hard sandstone, and coal lies below. What the defenders are at present working is part of the fine grey sandstone divided into two or three beds by partings of sandy clay, which vary in thickness from a hair line up to three-eighths of an inch. It is a peculiar sandstone containing less silica and a little more alumina, iron oxide, lime and magnesia than usual, and it is a material of peculiar quality, difficult to procure, and well suited, when ground down, for use in some kinds of important castings, and is of a high commercial value." The appellants alleged that by these operations the respondents endangered the safety of the appellants' railway, works, and buildings, and the appellants then brought the present action against the respondents, in which they sought (first) declarator that the appellants are proprietors of (a) the soil, (b) the clay, (c) the sand, and (d) the other substances presently being worked and removed by the lessees lying in, under, or upon the appellants' lands, and that the said soil, clay, sand, and other substances are not comprehended or included either (1.) in the mines of coal, ironstone, slate, or other minerals deemed to be excepted in terms of s. 70 of the said Act out of the conveyances of the lands held by the appellants, so far as these conveyances have been granted under, or under reference of, the said Act, or (2.) in the mines or minerals expressly excepted out of the said conveyances so far as mines or minerals are expressly excepted therefrom; and (second) declarator that the respondents are not entitled to work or remove any parts or portions of the said soil, clay, sand, or other substances presently being worked and removed by the lessees in, under, and from the said lands. The appellants also asked for an interdict against the lessees. The questions raised for decision in the Court below were shortly as follows: (1.) Whether the substances the respondents were working were sand and not sandstone; (2.) whether, if they could be so described as sandstone, they fell within the subjects excepted from the conveyances; and (3.) whether the notices by the lessees of their intention to work were given bona fide. At the Bar only the second question was argued, namely, taking the substance worked by the respondents to be sandstone, was

H. L. (SC.)

1909

—  
NORTH  
BRITISH  
RAILWAY  
C.

BUDHILL  
COAL AND  
SANDSTONE  
COMPANY.  
—



H. L. (Sc.)  
 1909  
 ~~~~~  
 NORTH
 BRITISH
 RAILWAY
 v.
 BUDHILL
 COAL AND
 SANDSTONE
 COMPANY.
 ———

sandstone a substance which fell within the exception of all “ mines of coal, ironstone, slate or other minerals ” in s. 70 of the Railways Clauses Consolidation (Scotland) Act, 1845 ? The Lord Ordinary (Lord Dundas) decided (June 22, 1907) that the substance which the lessees were working fell under the description of sandstone, that sandstone was included under the reservations in the appellants’ titles, and that the notice to work the same was given in bona fide, and not merely to rear up a fictitious claim, and, further, that there was neither averment nor proof to support the pursuers’ conclusion for lateral support. He accordingly assolizied the respondents from the conclusion of the summons. The Lord Ordinary’s interlocutor was on November 24, 1908, adhered to (1) by the majority of the Second Division of the Court of Session. Lord Ardwall dissented and held that the substances which the lessees were working did not fall under the denomination of sandstone ; but if the substances could be described as sandstone, then he held that they did not fall within the reservations.

1909. July 1, 2, 5. *Sir Alfred Cripps, K.C.*, and *F. T. Cooper, K.C.* (with them *Macmillan*) (the two latter of the Scottish Bar), for the appellants. The only question now to be argued is whether sandstone or freestone is included in the minerals excepted by s. 70 of the Railways Clauses Consolidation (Scotland) Act, 1845. Sects. 70 and 71 of the Railways Clauses Consolidation Act of 1845 for Scotland and ss. 77 and 78 of the English Act are in very similar words. The value of the stone, whether it be suitable for building or not, cannot be the test whether it is a mineral or not. The principle of all the cases is that in construing a statutory conveyance which excepts “ coal, ironstone, slate or other minerals ” it is necessary to see whether the substance in question is included in the exception. There is no decision of this House to the effect that sandstone is included in the statutory exception, while in *Menzies v. Earl of Breadalbane* (2) this House held that building stone did not fall within a reservation by a superior in a feu charter of the “ haill mines and

(1) (1909) S. C. 277.

(2) (1818) June 10, 19 Fac. Coll. 531 ; (1822) 1 Sh. App. 225.

minerals of whatever nature and quality" in the lands feued. That case is quite conclusive in favour of the appellants. Then in *Lord Provost of Glasgow v. Farie* (1), where the question arose under the Waterworks Clauses Act, 1847, this House decided that common clay was not within the exception. Clay therefore cannot be held to be a mineral, and in the same case Lord Mure (2) took occasion to say that freestone was not a mineral. Before the Act in question was passed, in *Duke of Hamilton v. Bentley* (3), freestone or sandstone was held not to be a mineral. See also James L.J. in *Hext v. Gill* (4); *Todd, Birlestone & Co. v. North Eastern Ry. Co.* (5); *Great Western Ry. Co. v. Blades.* (6)

H. L. (SC.)

1909

NORTH
BRITISH
RAILWAY
v.
BUDHILL
COAL AND
SANDSTONE
COMPANY.

There is no doubt that in *Jamieson v. North British Ry. Co.* (7) Lord Kinloch said freestone was within the reservation, but there neither the *Duke of Hamilton's Case* (3) nor *Menzies' Case* (8) was cited, and the decision was founded on English judgments under the Inclosure Acts. In *Glasgow and South Western Ry. Co. v. Bain* (9) freestone was held to be a mineral, following the dicta of Lord Watson in *Farie's Case* (1) and of Lord Kinloch in *Jamieson v. North British Ry. Co.* (7)

In *Forth Bridge Ry. Co. v. The Guildry of Dunfermline* (10) whinstone was held to be a mineral, but the judges considered they were bound by decisions in previous cases. It may be useful to take note of the substances which had been excluded from the definition of "minerals" in 1845, the date of the Act in question. The cases of *Menzies v. Earl of Breadalbane* (8), in 1822, and *Duke of Hamilton v. Bentley* (3), in 1841, decided that building stone and freestone were not minerals. See the observations of Lord Halsbury in *Farie's Case*. (1)

The railway company purchased the full proprietary right in the land, and it is for the respondents to shew the nature of the exception.

James A. Clyde, K.C., and C. H. Brown (both of the Scottish

(1) (1888) 13 App. Cas. 657.

(6) [1901] 2 Ch. 624.

(2) (1887) 14 R. at p. 357.

(7) (1868) 6 S. L. R. 188.

(3) (1841) 3 D. 1121.

(8) 19 Fac. Coll. 531; 1 Sh. App.

(4) (1872) 7 Ch. 699, 719.

225.

(5) [1903] 1 K. B. 603, 606.

(9) (1893) 21 R. 134, 137.

(10) (1909) S. C. 493.

H. L. (SC.)
1909
~
NORTH
BRITISH
RAILWAY
v.
BUDHILL
COAL AND
SANDSTONE
COMPANY.
—

Bar), for the respondents. For more than forty years sandstone has been treated as a mineral, and many hundred thousands of pounds have been paid by railway companies on the understanding that sandstone is excepted out of the conveyance. The term “minerals” as used in Scotland is vague. It may include almost everything. Its meaning must depend very much upon a consideration of how far the reservation of a particular substance will be inconsistent with the conveyance of the surface. It is impossible to shew that in 1845 the word “minerals” had, in the language of Scotland, a strict dictionary meaning, for various sections of the Act shew that minerals include “mines, coal, ironstone, and slate.” Slate in the Act is treated as a mineral, the word “mines” is used as equivalent to “minerals,” and both are used as interchangeable. In *Menzies v. Earl of Breadalbane* (1) the threat was to work the valuable building stone by open quarries and thereby to endanger the surface; and the respondents cannot admit that if it had been proposed to sink a mine for the purpose of getting stone the judgment of the House of Lords would have been the same. The considerations which apply to a common law conveyance cannot be applied to a conveyance under the Railways Clauses Consolidation Acts, a distinction recognized by Lords Watson and Herschell. Railway companies have only the right to the surface so far as it is not within the exceptions, but if the surface is composed of a single ounce of mineral they cannot take it. Lord Watson’s judgment is to the effect that if the surface is clay, and the clay goes down to a great depth, that clay is not a mineral, but his Lordship allows that clay in some cases may be a mineral. The situation of the alleged mineral must be taken into consideration. The exception out of the conveyance is of something (1.) which is a mineral, (2.) which lies in a series of beds or seams, (3.) which has a value independent of the surface, and (4.) which can be got at and worked for a profit. It is not easy to invent any meaning for the term “minerals” which will not leave a great number of questions unsolved. But the term “minerals” in the Act of 1845 is wide enough to include “slate”; it is therefore wide enough to include other substances which are used in

(1) 19 Fac. Coll. 531; 1 Sh. App. 225.

building, such as stone: see Lord Herschell in *Lord Provost of Glasgow v. Farie*. (1) Lord Herschell in *Midland Ry. Co. v. Robinson* (2) considered that *Menzies v. Earl of Breadalbane* (3) and *Duke of Hamilton v. Bentley* (4) would afford no light on the construction of the Act, and Lord Watson in *Lord Provost of Glasgow v. Farie* (5) appears to be of the same opinion. In *Great Western Ry. Co. v. Bennett* (6) Lord Cranworth expressed the opinion that where lands were compulsorily taken for making a railway the Legislature created a new code. In this case there is no sufficient reason for disturbing the long unbroken record of what has been the interpretation of "sandstone" in the law of Scotland, not only in the cases, but in the practice of the railway companies themselves. [They also referred to *Dixon v. Caledonian and Glasgow and South Western Ry. Co.* (7); *Todd, Birlestone & Co. v. North Eastern Ry. Co.* (8); *Great Western Ry. Co. v. Carpalla United China Clay Co.* (9); *Earl of Hopetoun v. North British Ry. Co.* (10)]

Sir Alfred Cripps, K.C., in reply.

The House took time for consideration.

Nov. 15. LORD LOREBURN L.C. My Lords, only one point has been argued before your Lordships, whether or not sandstone is a mineral within the meaning of s. 70 of the Scottish Railway Consolidation Act, 1845, which reserves from the company buying land the following: "any mines of coal, ironstone, slate, or other minerals."

A great number of authorities have been cited, irreconcilable in some respects. It will suffice to state the effect of the more important among them, so as to shew how qualified is the assistance to be derived from precedent.

Before the Act of 1845 was passed it was decided in the House of Lords in 1818 that building stone does not fall within a

(1) 13 App. Cas. 657, at pp. 681, 685.

(2) (1889) 15 App. Cas. 19, 27.

(3) 19 Fac. Coll. 531; 1 Sh. App. 225.

(4) 3 D. 1121.

(5) 13 App. Cas. 657.

(6) (1867) L. R. 2 H. L. 27, at p. 40.

(7) (1880) 5 App. Cas. 820.

(8) [1903] 1 K. B. 603.

(9) [1909] 1 Ch. 218, 231.

(10) (1893) 20 R. 704.

H. L. (Sc.)

1909

NORTH
BRITISH
RAILWAY
v.
BUDHILL
COAL AND
SANDSTONE
COMPANY.

H. L. (SC.)
1909
NORTH
BRITISH
RAILWAY
v.
BUDHILL
COAL AND
SANDSTONE
COMPANY.
—
Lord Loreburn
L.C.
—

reservation by a superior in a feu charter of the "hail mines and minerals of whatever nature and quality" in the lands feued: *Menzies v. Earl of Breadalbane*. (1) In 1841 the Second Division held that freestone or sandstone was not a mineral: *Duke of Hamilton v. Bentley*. (2) Both those cases related to the meaning of the word "minerals" in a private contract. Whether on that account they are to be ignored in construing the same word under s. 70 of the Act of 1845 is disputed. Lord Herschell, in *Midland Ry. Co. v. Robinson* (3), and Lord Watson, in *Lord Provost of Glasgow v. Farie* (4), are inclined to ignore. Lord Halsbury, on the other hand, in *Lord Provost of Glasgow v. Farie* (4), attaches the utmost importance to them.

I turn now to the Scottish decisions upon the construction of s. 70 itself. In 1868 Lord Kinloch held that freestone (which in Scotland includes sandstone) was a mineral within the section: *Jamieson v. North British Ry. Co.* (5) Lord Adam held in 1879 that limestone was a mineral in the same sense—*Dixon v. Caledonian Railway* (6)—the point apparently being admitted. The House of Lords decided that a seam of ordinary clay was not a mineral under the Waterworks Clauses Act, which for the present purpose is the same as the Railways Clauses Act: *Lord Provost of Glasgow v. Farie*. (4) In 1893 Lord Stormonth Darling decided that freestone was a mineral: *Glasgow and South Western Ry. Co. v. Bain*. (7) Finally, in January, 1909, the First Division, following the decision in the case now under appeal, held that whinstone was a mineral, the Lord President intimating that he had grave doubts, but was controlled by precedent after these decisions in the Court of Session: *Forth Bridge Ry. Co. v. The Guildry of Dunfermline*. (8)

In England, the House of Lords refused to restrain the vendor from quarrying for ironstone and limestone on land bought under the similar English Act by a railway company: *Midland Ry. Co. v. Robinson*. (3) But this case turned upon the question whether or not quarries of mineral as well as mines of mineral

(1) 19 Fac. Coll. 531; 1 Sh. App. 225.

(2) 3 D. 1121.

(3) 15 App. Cas. 19.

(4) 13 App. Cas. 657.

(5) 6 S. L. R. 188.

(6) 7 R. 216.

(7) 21 R. 134.

(8) (1909) S. C. 493.

are reserved in the Act. The point whether limestone of itself is a mineral under the Act was not argued or decided. Clay was held not to be a mineral in 1903: *Todd, Birleston & Co. v. North Eastern Railway*. (1) The same of blue brick clay was decided by Buckley J.: *Great Western Ry. Co. v. Blades*. (2) And in *Great Western Ry. Co. v. Carpalla United China Clay Co.* (3), now under appeal to this House, the Court of Appeal in 1908 held that china clay was a mineral. No decision has, however, gone so far as that of Lord Romilly in *Midland Ry. Co. v. Checkley*. (4) He was construing a Canal Act, practically identical in its terms, and he said: "Stone is, in my opinion, clearly a mineral and in fact everything except the mere surface, which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is gravel, marble, fireclay, or the like, comes within the word 'mineral' when there is a reservation of the mines and minerals from a grant of land."

H. L. (Sc.)

1909

NORTH
BRITISH
RAILWAY
v.BUDHILL
COAL AND
SANDSTONE
COMPANY.Lord Loreburn
L.C.

I have thought it right to summarize these cases (and I might have added a few others) lest it be supposed they are lost sight of. It is not possible to extract any uniform standard. The same is true of the opinions expressed by different learned judges. A variety of tests have been propounded, which are discussed by Lord Gorell. I agree with him both in his enumeration and in his criticism. Is the substance in common parlance a mineral? Is it so considered by geologists? Is it a substance of any peculiar value? No one principle has been accepted, and every principle appears to have its friends. In these circumstances it would be quite unprofitable to expect a solution by piecing together the dicta of even the most eminent authorities. They are contradictory. Your Lordships find the matter at large, so far as this House is concerned.

In considering whether sandstone is a mineral within the meaning of s. 70 of the Act of 1845 it is as well to look at the purpose which was in view when that Act was passed. The purpose was to enable a railway company to acquire land and build a railroad thereon to carry passengers and goods. Minerals,

(1) [1903] 1 K. B. 603.

(3) [1909] 1 Ch. 231.

(2) [1901] 2 Ch. 624.

(4) (1867) L. R. 4 Eq. 19.

H. L. (Sc.) however, were not to be acquired (except by express agreement).
 1909 It would be more accurate to say that mines of minerals were
 NORTH not to be acquired, but this distinction need not be dwelt upon
 BRITISH here.
 RAILWAY

v.
 BUDMILL Now, the leading purpose being to lay the permanent way,
 COAL AND how are we to regard this exception of minerals? It cannot
 SANDSTONE be better put than in a single sentence which I quote from
 COMPANY. Lord Ardwall's opinion. He says: "Any provision inconsistent
 Lord Loreburn with the leading purpose for which railway companies are
 L.C. empowered to take land must be viewed as introducing an
 exception, and falls to be construed strictly, and not extended
 beyond what the words of exception clearly cover." I apply
 that to the present case. In many parts of England and Scotland
 sandstone forms, as here, the substratum of the soil, with, no
 doubt, other kinds of rock intermixed. If it be a mineral, then
 what the railway company bought was not a section of the crust
 of the earth subject to a reservation of minerals, but a few feet
 of turf and mould, with a right to lay rails upon it, and liable to
 be destroyed altogether, unless the company chose on notice to
 buy the ordinary rock lying beneath it. For no one pretends
 that there is anything exceptional in this sandstone, either in
 point of higher value or rarity. It was agreed at the Bar that
 this was the ordinary freestone or sandstone. If the respondents
 are entitled to work this substance under this railway, the same
 must be true of chalk, or clay, or granite, or any other rock
 which forms the crust of the earth. I am aware that there are
 expressions of great judges favourable to such a contention.
 There are also other expressions in a diametrically opposite
 sense. Speaking for myself, I will not adopt so startling a
 conclusion unless I am compelled by a decision of this House,
 from which there is no escape. There is no such decision.

No doubt a railway company is not entitled to support from
 minerals, as an ordinary purchaser would be. No doubt, also,
 it is an advantage to railway companies that on acquiring lands
 for their enterprise they are not compelled to purchase minerals
 lying thereunder, and may wait and enjoy the support until
 the mineral owner requires them either to purchase the minerals
 or to take the risk of forfeiting the support. But it seems to

me that these circumstances do not affect the separate question, What, in fact, are the minerals so reserved? I cannot believe Parliament ever intended that the common rock of the district should be included in these words of reservation. If that were intended, I can see no need for inserting such words as "mines of coal, ironstone, slate, or other minerals." The Act is throughout consistent with the view which, with all respect, appears the obvious and commonsense view, that the railway company is by the conveyance to acquire the land in general, and the reservation is only of what is exceptional, as Lord Ardwall clearly says.

H. L. (SC.)
1909
NORTH
BRITISH
RAILWAY
v.
BUDHILL
COAL AND
SANDSTONE
COMPANY.
Lord Loreburn
L.C.

I desire to add that in my opinion the decisions in 1818 and 1841 as to the meaning of the word "minerals" in private conveyances are of the greatest importance in interpreting this statute. When an Act of Parliament uses a word which has received a judicial construction it presumably uses it in the same sense. The Act merely says what shall be deemed to be reserved out of the conveyance. It is the same as though there was in the conveyance a written exception of the substances reserved. It would be very strange if a Court, having before it two conveyances with a reservation of minerals in both, were obliged to treat the reservation as meaning one thing in the first and a quite different thing in the second, merely because the one was a voluntary conveyance by agreement and the other was compulsory under the Act. The Act does not say this. Why should it be said by the Court?

It is impossible to give an exhaustive definition of the meaning of the much debated words that are to be found in s. 70. But I hope your Lordships may assist in their interpretation. In the first place, I think it is clear that by the words "or other minerals" exceptional substances are designated, not the ordinary rock of the district. In the second place, I think that in deciding whether or not in a particular case exceptional substances are minerals the true test is that laid down by Lord Halsbury in *Lord Provost of Glasgow v. Farie*. (1) The Court has to determine "what these words meant in the vernacular of the mining world, the commercial world, and

(1) 13 App. Cas. 657.

H. L. (SC.) 1909 landowner's " at the time when the purchase was effected, and whether the particular substance was so regarded as a mineral.

Accordingly I move your Lordships to allow this appeal.

NORTH
BRITISH
RAILWAY
v.
BUDHILL
COAL AND
SANDSTONE
COMPANY.

LORD ATKINSON. My Lords, I have had the advantage of reading the judgment which has just been delivered by my noble and learned friend on the woolsack ; I have also had the advantage of reading the judgment which is about to be delivered by my noble and learned friend Lord Gorell. I concur fully with both of them and with the reasoning by which they have arrived at the conclusions which they have reached, and I have therefore nothing to add.

LORD GORELL. My Lords, the decision of your Lordships in this case is of very great importance to railway companies and landowners in Scotland, for the question raised is whether or not sandstone is a mineral within the meaning of s. 70 of the Railways Clauses Consolidation (Scotland) Act, 1845, which is as follows: "The company shall not be entitled to any mines of coal, ironstone, slate or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the works, unless the same shall have been expressly purchased ; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

The importance of the case is probably equally great to railway companies and landowners in England, for the 77th section of the English Act of the same year is in the same terms as the aforesaid section, and, although it may possibly be suggested that different considerations apply in England, in substance the question is the same in both countries.

The question depends on the true construction of the section, and although there have been numerous decisions upon it and the corresponding section of the English Act, many of which are referred to in the judgments of the learned judges of the Second Division, and much difference of opinion is to be found amongst learned judges who have considered the sections, there does not

appear to me to be any decision of this House which prevents a free consideration by your Lordships of the said 70th section, except possibly that in *Midland Ry. Co. v. Robinson*. (1) In that case it was held by Lords Herschell and Watson that the exception in the 77th section of the English Act included not only minerals got by underground working, but such as can only be worked by open workings. Lord Macnaghten dissented, and maintained the opinion he had previously expressed in the case of *Lord Provost of Glasgow v. Farie*. (2)

Which of the two views expressed is correct I do not think it is necessary to consider in this case, even if it be open to do so.

If that decision had been the other way, sandstone, or free-stone, as it is termed in Scotland, would not be considered as falling within the exception, for, as I understand, the stone in question is obtained by open workings; but it still remains for consideration whether it is a mineral within the meaning of the section, and to what extent the words "mines of" limit or qualify the generality of the term "minerals."

I do not propose to examine in detail all the other decisions. Their effect is very clearly stated in the judgment of the Lord Chancellor, which I have had the opportunity of reading.

If the question be considered by inquiring into the object of the section and of those sections which follow it and the language used, it seems at the outset to be reasonably clear that the word "minerals" must receive some limitation. The sections come under a heading "And with respect to mines lying under or near a railway, be it enacted as follows." The sections are to regulate the rights of railway companies who purchase land with the object of making a permanent line of railway with necessary works on the land, and the rights of owners of land who sell to them. The object of the companies is to obtain such an interest as will enable their lines and works to be properly constructed and maintained. For this they do not require to take the benefit of mines of minerals and the exploiting thereof, and therefore an exception of these is made so that an owner thereof, who may not at the time his land is

H. L. (Sc.)

1909

NORTH
BRITISH
RAILWAY
v.
BUDHILL
COAL AND
SANDSTONE
COMPANY.

Lord Gorell.

(1) 15 App. Cas. 19.

A. C. 1910.

(2) 13 App. Cas. 657.

3 K

H. L. (SC.)

1909

NORTH
BRITISH
RAILWAY

v.

BUDHILL
COAL AND
SANDSTONE
COMPANY.

Lord Gorell.

taken know whether it does or does not contain minerals, can either work the minerals, or, if a company does not wish him to do so for fear of injury to their line and works, they may prevent him from doing so by paying him adequate compensation.

The language used in the sections to carry out this object is somewhat vague. In the heading the term is "mines"; in the section the words "mines of coal, ironstone, slate or other minerals," and in subsequent sections the words "mines or minerals" and "mines" are found. That is to say that, except as regards coal, ironstone, and slate, indefinite terms are used which are obviously capable of limitation or expansion according to the intention with which they are used. The object of the sections appears to have been to permit of the establishment of a permanent way and yet to allow landowners to retain the benefit of matters which might prove of exceptional value to them, unless the company chose when the time came to compensate them for the loss of such value.

Bearing these considerations in mind, it has to be ascertained in what sense the indefinite term "minerals" has been used in the section. Several interpretations either have been or may be suggested. These are (1.) that the term "minerals" includes everything except the vegetable surface, or everything except the mere surface which is used for agricultural purposes; (2.) that it includes everything below the soil and subsoil; (3.) that it includes every substance which can be got from underneath the surface of the earth for the purpose of profit; (4.) that it includes all such bodies of mineral substances lying together, in seams, beds, or strata, as are commonly worked for profit and have a value independent of the surface of the land; (5.) that the words "other minerals" include minerals which can reasonably be said to be ejusdem generis with coal, ironstone, and slate, and that stone is ejusdem generis with slate; (6.) that these words are used in the ordinary sense in which they are understood and used by landowners and those engaged in mining and commerce.

The first meaning is that which was given by Lord Romilly to the term "mineral" in a statutory reservation of "mines and

minerals" in *Midland Ry. Co. v. Checkley* (1), where he said: "Stone is, in my opinion, a mineral, and in fact everything except the mere surface, which is used for agricultural purposes: anything beyond that which is useful for any purposes whatever, whether it is gravel, marble, fireclay, or the like, comes within the word 'minerals' where there is a reservation of the mines and minerals from a grant of land; every species of stone, whether marble, limestone, or ironstone, comes, in my opinion, within the same category."

H. L. (Sc.)

1909

NORTH
BRITISH
RAILWAY
v.

BUDHILL
COAL AND
SANDSTONE
COMPANY.

Lord Gorell.

To give this meaning to the words as used in the 70th section would, in my opinion, be inconsistent with the object of the statute, would not give adequate effect to the use of the word "mines," and would render the introduction of the words "coal, ironstone, and slate" superfluous. If it had been intended to reserve everything except the surface, it is natural to suppose that such intention would have been expressed in very different language.

The second interpretation may be suggested by the language used by Lord Watson in *Farie's Case* (2), though I do not think that he meant by stating that the expression "the land" cannot be restricted to vegetable mould or to cultivated clay, but that it naturally includes, and must be held to include, the upper soil, including the subsoil, whether it be "clay, sand, or gravel," to intimate that everything below the subsoil was to be considered "minerals." Almost the same observations which I have made on the first interpretation may be made on this.

The third meaning is to be found placed by Mellish L.J. upon the term "minerals" in the deed in the case of *Hext v. Gill*. (3) But he qualifies it by saying "unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning."

The fourth is adopted by Lord Herschell. (4)

To my mind these two interpretations do not give sufficient effect to the context. If it had been intended in framing the section to adopt either of them, it would have been unnecessary

(1) L. R. 4 Eq. 19.

(2) 13 App. Cas. 657, 679.

(3) 7 Ch. 699, 712.

(4) *Lord Provost of Glasgow v. Farie*, 13 App. Cas. at p. 685.

H. L. (Sc.)

1909

NORTH
BRITISH
RAILWAY
v.
BUDHILL
COAL AND
SANDSTONE
COMPANY.

Lord Gorell

to specify particularly coal, ironstone, and slate. Moreover, they would make the decision depend on the cost of production and labour and the state of the market, and render uncertain that which those framing the section must have contemplated as reasonably certain. And, further, they are inconsistent with the decision at which this House arrived in *Farie's Case* (1), that clay (which appears in that case to have been of considerable value) was not within the exception in the 18th clause of the Waterworks Clauses Act, 1847, a clause which was similar to that in question. The purpose of profit may have a bearing upon the question whether certain substances have been recognized as included in the term "minerals," but does not necessarily determine that they have been ordinarily understood to be so included.

With regard to the suggestion that the words "other minerals" include substances ejusdem generis with those enumerated, I confess I have a difficulty in following the point. The usual construction of general words following particular matters enumerated is to limit them by restricting their application to matters similar in kind to those specifically mentioned: see for instance the Marine Insurance Act, 1906, First Schedule, r. 12, and *Cullen v. Butler*. (2)

But it must first be shewn that the general words cover the matter under consideration, and then it becomes a question whether the effect of limiting the general words by reference to the particular matters enumerated is to exclude the matter in doubt. It is therefore necessary in the present case to inquire first whether sandstone is a mineral within the general words. If it is not, then the exception does not apply. If it is, then a question might arise whether it is ejusdem generis with those enumerated.

The argument for the respondents was that the effect of the words of enumeration was to expand the general words, and that because stone is like slate, therefore it is a mineral within the meaning of the general words. This seems to me to be illogical and contrary to the principles applied in dealing with general

(1) 13 App. Cas. 657.

(2) (1816) 5 M. & S. 461.

words ; moreover, there is, so far as I can understand, no common genus within which coal, ironstone, and slate can be comprised, and no basis for the suggestion that stone is to be considered as of the same genus as slate. Arguments founded on one mineral being of like kind with another hardly seem applicable. Lead, copper, tin, salt, I presume, would be considered minerals ; but can they be said to be ejusdem generis with coal, ironstone, or slate ?

H. L. (Sc.)

1909

NORTH
BRITISH
RAILWAY
v.
BUDHILL
COAL AND
SANDSTONE
COMPANY.

Lord Gorell.

The last suggested interpretation remains for consideration. In my opinion the true test of what the section means by "mines of minerals" is there indicated.

This interpretation forms the foundation of the judgments in the Scottish cases of *Menzies v. Earl of Breadalbane* (1) and *Duke of Hamilton v. Bentley* (2) ; though those cases depended upon the construction of deeds. Lord Mure's view of these cases is that they "settle in the most authoritative manner that by the law of Scotland adjudicated upon in the Court of last resort, a reservation of 'mines and minerals' in a disposition of property does not comprehend a reservation of freestone or a right to work freestone within that property." (3)

In the *Duke of Hamilton's Case* (2) freestone quarries were said not to be included "in common parlance" in "mines and minerals." It is true that these cases depended upon the deeds, the context in them, and the relative position of the parties, but I cannot think that they are of no assistance in ascertaining the meaning of the words used in the section in question, though these cases were not applied in *Jamieson v. North British Ry. Co.* (4), where Lord Kinloch held that sandstone was a mineral and within the exception.

The decision in that case appears to have been influenced by two English cases, *Earl of Rosse v. Wainman* (5) and *Micklethwait v. Winter* (6), but these cases seem to have been decided on the special terms of Inclosure Acts, and the two previous Scottish cases above mentioned are not referred to in

(1) 19 Fac. Coll. 531 ; 1 Sh. App. 225.

(2) 3 D. 1121.

(3) 14 R. 357.

(4) 6 S. L. R. 188.

(5) (1845) 14 M. & W. 859.

(6) (1851) 20 L. J. (Ex.) 313.

H. L. (SC.) 1909 the report of the judgment. The case still stands, but its correctness is questioned on this appeal.

NORTH Further, James L.J. suggested, and would, but for prior
BRITISH cases which bound him, have adopted, as I understand, this
RAILWAY interpretation of "mines and minerals" reserved in a grant:
v. *Hezt v. Gill* (1); Buckley L.J. wished he could adopt it:
BUDHILL *Great Western Ry. Co. v. Blades* (2); and Lord Halsbury
COAL AND approved of it in his judgment in *Farie's Case* (3), and held clay
SANDSTONE not to be a mineral within the meaning of the exception. He
COMPANY. also quoted with approval Lord M'Laren's judgment. (4) Do
Lord Gorell. not his reasons apply with equal force to the common stone of
the country?

It seems to me to be reasonably clear that the exception has limits. It is found in an Act which regulates the relative rights of railway companies, landowners, and persons engaged under them in mining "under and near" railways, and had to be applied by these parties. Is it not also reasonable to assume that the Legislature in framing it intended it to be acted upon as those parties would understand it? The enumeration of certain specified matters tends to shew that its object was to except exceptional matters, and not to include in its scope those matters which are to be found everywhere in the construction of railways, such as clay, sand, gravel, and ordinary stone. This is emphasized by the use of the term "mines."

There was no evidence in the present case that "mines of minerals" were, either at the time of the passing of the Act or of the conveyance, or are now, understood and used by such parties as aforesaid as including ordinary sandstone, and if this could have been done it was, in my opinion, for the respondents to prove it.

In my opinion the appeal should be allowed.

LORD SHAW OF DUNFERMLINE. My Lords, at various dates between 1869 and 1876 the appellants, the North British Railway Company, acquired from the respondents, or their authors, certain portions of land for the purposes of the railway undertaking.

(1) 7 Ch. 719.

(2) [1901] 2 Ch. 637.

(3) 13 App. Cas. 668.

(4) 14 R. 349.

The conveyances to be construed in this action applying to certain portions of these lands were granted in terms of the Railways Clauses Consolidation Act, 1845. Other portions of the lands were acquired under ordinary conveyances with the reservation of minerals expressed as "subject to and in terms of the provisions of" the same statute.

It appears that these lands contain freestone. The railway company maintain that this freestone is included in the conveyances to them. The respondents maintain that freestone falls within the exception from the conveyance of all mines of coal, ironstone, slate, or other minerals. The Second Division of the Court of Session (Lord Ardwall dissenting) have affirmed the latter contention. As the language of s. 70 of the Scottish Act is similar to that of s. 77 of the English Railways Clauses Act, the question to be determined is of importance in both kingdoms. Two general principles apply to such a position. First, that unless there be some controlling reason to the contrary, the interpretation in both countries should be the same. This is manifest enough. In the second place, the language of the statute should be interpreted in accordance with its plain and ordinary meaning as generally understood, and all artificiality of signification which by being imported into the statutory language would differentiate it from such plain and ordinary meaning and from the meaning in conveyances at common law falls to be avoided. I should have thought that this proposition was as manifest as the other, were it not that, upon the authorities cited at your Lordships' Bar, it appears that the subject has occasioned differences of opinion among judges of great eminence.

Fortunately, there is little room for doubt that under a conveyance, according to the common law of Scotland, freestone is not included within an exception or reservation of mines and minerals, and that it goes with and is reckoned as part of the land conveyed. This was settled by the case of *Menzies v. Earl of Breadalbane*. (1) From the report of the case in the Faculty Collection it appears to have been keenly and repeatedly argued, and even the succinct report of the pleadings contains an

H. L. (Sc.)

1909

NORTH
BRITISH
RAILWAY
v.

BUDHILL
COAL AND
SANDSTONE
COMPANY.

Lord Shaw of
Dunfermline.

(1) 19 Fac. Coll. 531 ; 1 Sh. App. 225.

H. L. (Sc.) 1909 anticipation of not a little of the arguments on both sides in both countries on the topic ever since.

NORTH
BRITISH
RAILWAY
v.
BUDHILL
COAL AND
SANDSTONE
COMPANY.

Lord Shaw of
Dunfermline.

The term for construction in that case was of “the hail mines and minerals of whatever nature or quality”—this reservation occurring in a feu charter. It was held that certain particular building stone was not contained within the exception. On appeal to this House the judgment was affirmed, Lord Eldon observing: “It does appear to me to be the better opinion that mines and minerals in this feu did not mean stone quarries.”

The case was followed by that of *Duke of Hamilton v. Bentley* (1), where the expression “coal and other metals, fossils and other minerals” was decided not to comprehend freestone. These decisions are analysed and commented upon in a careful and elaborate judgment of Lord Mure in *Farie’s Case* (2) in the Court of Session. I pause here to say that I do not think it has ever been doubted since the cases of *Menzies* (3) and *Hamilton* (1) that, in all ordinary charters or conveyances in Scotland, freestone is not comprehended within an exception of mines and minerals. I ask myself what is the reason, or what reason has ever been assigned, for giving a different interpretation to the same language, when that language is employed in a statutory conveyance. It is not without significance that the *Duke of Hamilton’s Case* (1), accepting the settled law as above described, occurred in the year 1841. The Railways Clauses Act was passed within four years. I have for myself the greatest difficulty in understanding how it can be suggested that Parliament then and thus using the language “mines,” “minerals,” &c., did so in a sense different from that authoritatively accepted as the common law of the land. In the present case, however, the majority of the judges have so held.

Lord Dundas says “it is sufficient for the present purpose to observe that cases decided upon the construction of feu charters or other agreements between parties can afford little or no assistance in determining the true meaning of a statutory conveyance embodying the statutory exception of mines and minerals.”

(1) 3 D. 1121.

(2) 14 R. at p. 356.

(3) 19 Fac. Coll. 531; 1 Sh. App. 225.

This, of course, does not assign any reason for adopting a difference in signification. Such a reason, however, is proponed by two other judges of the highest eminence. Lord Herschell, in the case of *Midland Ry. Co. v. Robinson* (1), speaking of agreements between parties unaffected by any statutory enactment, says: "In such agreements, in the absence of a distinct indication of the contrary intention, it is always to be assumed that the reserved mines are only to be worked in such a manner as is consistent with the surface remaining undisturbed. . . . But in the case of mines reserved under s. 77 of the Railways Clauses Act, the case is different. It is clear that the mines reserved, if not purchased by the company, may be so worked as to interfere with the surface, the only limitation being that the working must be according to the usual manner of working such mines in the district where the same are situate."

Lord Watson had given the same reason in *Farie's Case*. (2) "Irrespective," he says, dealing with *Menzies' Case* (3), of other considerations which differentiate that case from the present, "there is little analogy between a reservation of minerals coupled with an obligation to support the surface, and a reservation not only of the minerals but of the right to work them without giving support."

My Lords, I regret that I am unable to see the cogency or sufficiency of the presence or absence by law of a right to support of the surface as a rule or reason for differentiation or distinction as within the category of minerals reserved. It is sometimes the case that in common law conveyances minerals are expressly reserved, and by the same deed a feuar or dispoonee is declared to have no right to support, and no claim in respect of failure to support, the surface. A well-known and much commented on instance of this was the case of *Buchanan v. Andrew*. (4) I cannot think that in such a case as *Buchanan's* much countenance would have been given to the suggestion that because the conveyance excluded the right to support,

H. L. (Sc.)

1909

NORTH
BRITISH
RAILWAY
v.
BUDHILL
COAL AND
SANDSTONE
COMPANY.

Lord Shaw of
Dunfermline.

(1) 15 App. Cas. at p. 27.

(3) 19 Fac. Coll. 531; 1 Sh. App.

(2) 13 App. Cas. 674.

225.

(4) (1873) L. R. 2 Sc. & D. 286.

H. L. (SC.) therefore the reservation of minerals would fall to be construed differently from a reservation in an ordinary common law conveyance.

1909

NORTH
BRITISH
RAILWAY
v.

BUDHILL
COAL AND
SANDSTONE
COMPANY.

Lord Shaw of
Dunfermline.

Further, when one considers that under the Railways Clauses Act, although the right to support is not in the initial conveyance dealt with or guaranteed, still provisions are made whereby, after notices served, the subjacent support can be secured as of right, the reason for differentiation in substance disappears.

I may also observe that while the railway undertaking traverses the lands of the same or various proprietors, some instances may occur of common law conveyances which have been obtained for reasons connected with the expense attending statutory procedure and the like, while other instances will occur of statutory conveyances. In the present case before your Lordships' House the instance of varieties of conveyance even from the same proprietor occurs. It would be indeed strange if the rights of the owner and of the railway company respectively with reference to the contents of the conveyances of adjoining lands differed because the language "mines and minerals" meant one thing when it was derived from the statute and another when derived from ordinary conveyancing language.

On this part of the case I respectfully adopt the language used by Lord Halsbury in *Farie's Case*. (1)

I trust the decision of your Lordships' House in this case will put an end to the confusion which undoubtedly exists in the mind of the public and of the profession on the subject in hand. That confusion arises from two main causes which ought to be noted. The first cause is the judgment of the Lord Ordinary Kinloch in *Jamieson v. North British Ry. Co.* (2), holding that sandstone was a mineral within the statutory exception. This judgment was not reclaimed against. And I agree with Lord Gorell that it may have proceeded to some extent upon a misapprehension of the two English cases interpreting Inclosure Acts to which my noble and learned friend refers. Further, the judgment appears to take no stock or account of the cases of

(1) 13 App. Cas. 657, 668.

(2) 6 S. L. R. 188.

Menzies (1) and *Hamilton* (2) and the common law interpretation which they establish. The second cause of confusion has arisen, I venture to say, from treating a dictum of Lord Watson's in a manner which that most distinguished judge had distinctly by anticipation repudiated, namely, as a decision upon the point. The language of Lord Watson in *Farie's Case* (3), which must be alluded to, is, "My present impression is that . . . 'other minerals' must necessarily include all minerals which can be reasonably said to be ejusdem generis with those enumerated. Slate being one of them, I do not think it would be possible to exclude freestone or limestone strata"; and his Lordship almost immediately adds, "but I desire to say that, in the view which I take of the present case, it is not necessary to determine any of these points." Yet, my Lords, this very guarded and non-decisive utterance is thus treated by the Lord Justice Clerk in *Glasgow and South Western Ry. Co. v. Bain* (4): "Slate is one of the things which are expressly mentioned, but slate is not in the ordinary sense a mineral; it is a thing quarried out of the ground to be used for building purposes, just as stone is; accordingly in the case of *Farie* in the House of Lords it appears to have been regarded as impossible to exclude freestone and limestone when slate was included." It humbly appears to me that such a view of the matter decided in *Farie's Case* (3) is erroneous, and that the decision of *Bain's Case* (4) was largely governed by this mistake. The embarrassment produced by *Bain's Case* (4) is manifest from the recent case of *Forth Bridge Ry. Co. v. Guildry of Dunfermline* (5), in which, while constrained to follow *Glasgow and South Western Ry. Co. v. Bain* (4), Lord Kinneir stated that if the question had been open he should have thought it one of considerable difficulty, and the Lord President Dunedin suggested that there were grave reasons against holding that whinstone or sandstone were minerals in the sense of the statutory exception. I entirely agree with the learned Lord President that this is so. A true interpretation, when it takes the form of a definition, may be

H. L. (Sc.)

1909

NORTH
BRITISH
RAILWAY
v.
BUDHILL
COAL AND
SANDSTONE
COMPANY.

Lord Shaw of
Dunfermline.

(1) 19 Fac. Coll. 531; 1 Sh. App.
225.

(2) 3 D. 1121.

(3) 13 App. Cas. 657.

(4) 21 R. 134, 137.

(5) (1909) S. C. 493.

H. L. (Sc.)
 1909
 NORTH
 BRITISH
 RAILWAY
 v.
 BUDHILL
 COAL AND
 SANDSTONE
 COMPANY.

Lord Shaw of
 Dunfermline.

open to danger, but for practical purposes I respectfully agree with Lord Halsbury in his adoption of the language of James L.J. in *Hext v. Gill* (1), that “a grant of mines and minerals is a question of fact—what these words meant in the vernacular of the mining world, the commercial world, and landowners.” The same canon of interpretation had a generation before been adopted by Lords Meadowbank and Medwyn, although in much simpler language, in *Hamilton’s Case*. (2) “If you were to ask any one,” said the latter judge, “whether a common freestone quarry comes under a reservation of mines and minerals they would answer that it did not.” This was decided to be the law of Scotland, and is so still. I do not think, as I have stated, that any case has been made out, apart from the authorities with which I have dealt, for a different or artificial interpretation of similar words because they occur in a statute.

My Lords, I have thought it right to treat with some fulness the Scottish decisions. I agree, substantially, with the result arrived at by the learned Lord Ardwall in the Court below. I have had the great advantage and pleasure of reading the judgments of my noble and learned friends the Lord Chancellor and Lord Gorell, who have dealt with the state of the law as reached in England. I respectfully agree with those judgments and with the course proposed from the woolsack.

LORD LOREBURN L.C. My Lords, Lord James of Hereford has asked me to express his agreement in the opinion which I have conveyed to your Lordships.

C. H. Brown. As to costs, there were three questions raised and argued in the Court of Session. The first was whether this substance was truly sandstone or not; another question was whether my clients had acted in good faith in giving their notice and in carrying on their workings; and the third question, and the only purely legal question, was, if it be sandstone, then is sandstone a mineral within the sense of the Act? The first two

(1) 7 Ch. 712.

(2) 3 D. 1121.

questions were only given up when the case had reached your Lordships' House, although it was entirely to the first two questions that the long and expensive proof referred. On the first two questions we were right. On the third, the point of law, the Courts below held that we were right and your Lordships' House has held that we were wrong. The whole or a large part of the printing of the proof and a large part of the debate in the Inner House had to do, therefore, with questions upon which the respondents have been entirely successful. I should therefore suggest that they should get the expenses of and connected with the proof. Quoad ultra I would suggest that it might be a case for no expenses in view of the difficulty of the question and the misapprehension that existed in the minds of many people as to the true state of the law upon this matter. In the appellants' case as presented to your Lordships' House the whole three points were persisted in, although not all were argued.

Sir A. Cripps. We do not ask for costs so far as they have been increased by the first two matters, namely, the question of its being sandstone or sand, and the point of bona fides. We maintained the sandstone point and argued it in this House on the assumption that it was sandstone in order to get a decision in this House upon a point which both parties desired to have decided. I may say we have paid the costs already in the two Courts below. Of course those will be repaid to us in accordance with the order of your Lordships' House.

LORD GORELL. A great part of the costs in this case must have been in regard to the proof.

LORD LOREBURN L.C. I think their Lordships desire that what in England we would call the costs of the pleadings, that is to say, going up to the joinder of issue which in Scotland Lord Shaw instructs us is the closing of record, are to be the pursuers' costs. That would not include the costs of any witnesses, I take it. That is, the costs till closing of record to be the pursuers', the costs of the trial to be the defenders', and the costs in the Inner House and in this House to be the pursuers'.

H. L. (Sc.)

1909

NORTH
BRITISH
RAILWAY
v.
BUDHILL
COAL AND
SANDSTONE
COMPANY.

H. L. (SC.) 1909
 That will include repayment of costs already paid in the Inner House.

NORTH
 BRITISH
 RAILWAY
 v.
 BUDHILL
 COAL AND
 SANDSTONE
 COMPANY.

Ordered that the interlocutors appealed from except in so far as they relate to the first, third, and fourth finding contained in the interlocutor of the Lord Ordinary of June 22, 1907, be reversed; and that, so far as they relate to the said findings, be affirmed (here followed a long declaration of the appellants' rights).

Further ordered (1.) that the respondents jointly and severally pay to the appellants the costs incurred by them in the Court of Session up to the closing of the record; (2.) that the appellants pay to the respondents the costs of the trial incurred by them; (3.) that the respondents jointly and severally pay to the appellants the costs incurred by them in the Inner House of the Court of Session, and also the costs incurred by them in respect of the appeal in this House; and (4.) that the respondents jointly and severally repay to the appellants the costs paid by them to the respondents under the said interlocutors.

Lords' Journals, November 15, 1909.

Agent for appellants: *John Kennedy, W.S., for James Watson, S.S.C., Edinburgh.*

Agents for respondents: *Ballantyne, M'Nair & Clifford, for Smith & Watt, W.S., Edinburgh, and John Steuart & Gillies, Writers, Glasgow.*

[HOUSE OF LORDS.]

EDINBURGH LIFE ASSURANCE COMPANY . APPELLANTS ; H. L. (Sc.)

AND

1909

LORD ADVOCATE (INLAND REVENUE) . . . RESPONDENT.

Dec. 9.

Revenue—Income Tax—Sale of Annuities—Assessment on Revenue from Invested Funds—Income Tax Act, 1842 (5 & 6 Vict. c. 35), Sched. D, s. 102—Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 40—Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 24, sub-s. 3—Costs where Crown Litigant.

By the Customs and Inland Revenue Act, 1888, s. 24, sub-s. 3, upon payment of any interest of money or annuities charged with income tax under Sched. D and not payable or not wholly payable out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge.

The appellant company carried on the ordinary business of a life insurance company, including the granting of annuities. The co-partnership contract of the company provided that every policy of insurance or other obligation should contain a clause declaring that the capital, stock, and funds of the company should be the only fund answerable for any demand under such policy or other obligation. The company had a very large annual income from interest, dividends, and rents, from which income tax was deducted at the source. The income from interest, dividends, and rents was amply sufficient to pay the annuities in full. The company also had an income from premiums, but if the income from interest, dividends, and rents had been deducted from the company's revenue the trading of the company would have resulted in a quinquennium deficit. No formal appropriation of the income from interest, dividends, and rents was made in the books, nor was any particular fund specially charged with the payment of the annuities. In paying their annuities the company deducted the amount of income tax due in respect thereof and retained the amount of the tax so deducted :—

Held (reversing the decision of the First Division of the Court of Session), that the company were entitled to retain for their own benefit the whole of the income tax deducted from the annuities, for where annuities are charged upon a tax-bearing fund from which the tax has been deducted at its source and which is amply sufficient to pay them in full, although not set apart for that purpose, they cannot be held

H. L. (Sc.)

1909

EDINBURGH
LIFE
ASSURANCE
COMPANY*v.*
LORD
ADVOCATE.

to be not "payable" or not wholly "payable out of profits or gains brought into charge" within the meaning of the Act.

Held, also, that the claim to the tax having failed, the Crown was liable for the costs in the Court below and in the House, in the same manner as if the action had been between subjects.

APPEAL from a decision of the First Division of the Court of Session, Scotland, sitting as the Court of Exchequer. (1)

The appellants were the Edinburgh Life Assurance Company, and the respondent the Lord Advocate acting on behalf of the Commissioners of Inland Revenue. The facts were given as follows by Lord Gorell:

"The facts which give rise to the question in this case are simple. The appellants carry on the ordinary business of a life insurance company, including, *inter alia*, the selling of annuities both immediate and deferred. An immediate annuity is purchased by a single payment of a lump sum; a deferred annuity may be purchased either by a single payment or by a series of instalments. The revenue of the company consists of (1.) interest on investments, dividends, and rents; (2.) premiums for life insurances; (3.) consideration money for annuities; and (4) a small sum representing assignments and transfer fees and other miscellaneous receipts. Its outgoings consist of (1.) claims under policies; (2.) surrenders; (3.) annuities; (4.) commission and expenses of management; (5.) dividends to shareholders; and (6.) income tax.

"The interest, &c., which the company receives from its investments forms a large portion of its revenue, and but for it there would be a large annual deficit. From this interest, &c., income tax is deducted at the source, and it is not included by the company in arriving at the balance of profits and gains for the purpose of direct assessment under the Income Tax Acts under Case 1 of Sched. D. The company, therefore, returns its profits and gains as nil, and the return has been accepted by the Income Tax Commissioners. The income tax deducted from the interest, &c., on the investments largely exceeds the amount which would be yielded by an assessment on the profits as a trading concern.

“In paying the annuities for which they are liable the company deduct income tax at the proper rate. The annuities paid for the period from April 5, 1905, to November 30, 1907, amounted to 116,259*l.* 13*s.*, and the income tax deducted by the company on payment of these annuities amounted to 5809*l.* 3*s.* 7*d.*

H. L. (SC.)
1909
EDINBURGH
LIFE
ASSURANCE
COMPANY
v.
LORD
ADVOCATE.

“The respondent brought the present suit by summons on June 18, 1908, to recover the latter sum from the appellants, on the ground that under the Income Tax Acts the appellants are bound, as the Commissioners of Income Tax allege, to pay this sum to the Crown ; whereas the appellants claimed to retain it, on the ground that the annuities were payable and had been paid out of profits and gains already brought into charge for income tax.

“It will be convenient here to shew the position of the appellants with regard to the annuities by a reference to their operations for the quinquennial period ending December 31, 1907. During that period their total receipts were :—

Premiums	£ 1,529,502
Consideration for annuities . .	178,074
Assignment and transfer fees . .	684
Profits on investments realized .	2122
Making	1,710,382
Interest, dividends, and rents . .	804,731
Total	2,515,113

“The total expenditure was 1,973,096*l.*, of which expenses of management amounted to 168,204*l.* and annuities paid to 218,463*l.* In addition there was a sum of 207,567*l.* in respect of increased liabilities actuarially ascertained, which with the 1,973,096*l.* made a total of 2,170,663*l.*, so that the surplus of receipts over expenditure was 334,450*l.* If the sum of 804,731*l.* for interest, dividends, and rents were not brought into account there would have been a deficit of 470,281*l.*

“The Lord Ordinary (Lord Johnston) by interlocutor of July 30, 1908, assolvizied the appellants from the conclusions

H. L. (Sc.) of the summons, but on appeal the First Division of the
 1909 Court of Session decided (1) the case on a ground which
 EDINBURGH was not put forward by the Crown, either before the Lord
 LIFE Ordinary or in the Inner House. They held that the 'annuities
 ASSURANCE paid by the' appellants 'in any year fall to be debited pro-
 COMPANY portionally against their revenue on which income tax has been
 v. paid and their revenue on which income tax has not been paid
 LORD in each year, and that' the appellants were 'bound to account
 ADVOCATE. to the' respondent 'for income tax on the portion of the
 annuities thus paid out of revenue which had not paid income
 tax'; and they remitted the case to the Lord Ordinary to fix
 the amount of income tax due in terms of their findings.

"The effect of this judgment, if it be applied to the quinquennial period above mentioned, will be that the appellants must apportion the sum of 218,463*l.* paid by them to their annuitants rateably between (1.) the 804,731*l.* of interest, dividends, and rents on which they paid income tax, and (2.) the rest of their receipts, amounting to 1,710,382*l.*, on which income tax has not been paid; and therefore, although they have paid income tax on the sum of 804,731*l.*, they would have to pay to the Crown in addition rather more than two-thirds of the income tax deducted by them from the annuities paid by them.

"The appellants appeal against this decision and seek to have the interlocutor of the Lord Ordinary restored. There is no cross-appeal, and therefore the question is whether the appellants are entitled to retain the whole of the income tax deducted by them from the annuities paid by them, or only a portion thereof, to be ascertained by the method above stated."

1909. July 9, 20, 21. *Sir R. B. Finlay, K.C.*, and *Scott Dickson, D.F.* (with them *J. R. N. MacPhail*) (the two latter of the Scottish Bar), for the appellants. The contention on the part of the Crown is founded upon sub-s. 3 of s. 24 of the Customs and Inland Revenue Act, 1888 (2), and on the case of *Gresham Life Assurance*

(1) March 9, 1909, S. C. 847.

(2) By the Customs and Inland Revenue Act of 1888, s. 24, sub-s. 3,
 "Upon payment of any interest of

money or annuities charged with income tax under Sched. D and not payable or not wholly payable out of profits or gains brought into

Society v. Styles. (1) It was there decided that if an insurance company are assessed to income tax in the ordinary way on their trade profits the annuities in which they deal are not to be taken as being paid out of profits. It is contended on the authority of that case that the appellants are bound to hand over the whole amount that they have deducted in respect of income tax on the 218,463*l.* paid to the annuitants. The revenue authorities have not of recent years been in the habit of assessing insurance companies in respect of their profits in the ordinary way, which would involve treating annuities as they were treated in the *Gresham Case* (1), but they have found it more profitable to assess the companies and to collect the income tax on the interest of their investments and rents, if they have any. Here the Crown have received income tax on the 804,731*l.* which represents the income of the company from investments. Having received the income tax in respect of this amount, they cannot claim it again on that sum or a portion of that sum by charging the company in respect of profits made in the ordinary course of business, for without bringing in the 804,731*l.* there can be no profits of the business whatever; but when the Court of Session came to give judgment, they gave judgment that there should be a remit to inquire how the thing worked out on the proportion of the annual receipts and the payment of the annuities. Premiums in the case of life insurance cannot be regarded as annual income or profits. They are really in the nature of capital payments. In defraying the annual charges, whether they be the expenses of management or the payment of annuities, the first sum applicable towards the charges is the annual income. A premium, on the theory of life assurance, is a payment of a capital sum, which may be paid in one lump sum or distributed over five years or ten years or over life. The premiums, whatever may be their amount, have to be kept in hand to enable the

H. L. (SC.)
1909
EDINBURGH
LIFE
ASSURANCE
COMPANY
v.
LORD
ADVOCATE.

charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in full at the time of such payment, and shall forthwith render an account to

the Commissioners of Inland Revenue of the amount so deducted or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge as the case may be."

(1) [1892] A. C. 309.

H. L. (SC.)
 1909
 EDINBURGH
 LIFE
 ASSURANCE
 COMPANY
 v.
 LORD
 ADVOCATE.

company to meet the payments on the policies which become due, and this is accomplished by investing year by year the amount of the premiums which has been received. The nature of premium income is defined in *Northern Assurance Co. v. Russell* (Lord President Inglis) (1); see also *Last v. London Assurance Co.* (2), where no appeal was brought on this point to this House; *London County Council v. Attorney-General* (3); *London County Council v. Attorney-General* (second case). (4) Premium income is really in the nature of capital payments. It is in most cases paid annually, but there is no difference in principle between the payment of a lump sum or payment of an annual sum during a man's life. During the early part of the existence of a company there are very few claims, unless there be some extraordinary accident. In this interval they are able to accumulate the premiums, even if they have no capital. If, in the case of an annuity granted in consideration of a lump sum, this sum were divided as part of the profits, nothing would be left out of which the annuity could be paid. The claim of the Crown is one which is met by the language of Lord Davey in *London County Council v. Attorney-General* (5), it being a claim to treat premiums which are in the nature of capital payments as being on the same footing with rents and interest which are annually received. The Lord Ordinary was right in holding that the company were bound to keep down their annual current obligations, including those in respect of annuities, by paying them out of current income or invested funds. The manner in which the company keeps its accounts cannot alter the question of liability, and they are entitled to say "We paid income tax on 804,731*l.*, that is income primarily applicable to the payment of annual charges." The annuities are 218,463*l.*, while the income from investments is 804,731*l.*, and the payment of these annuities must, according to all business principles, be taken to have been paid out of the income and not out of the premium fund. The Crown selected

(1) (1889) 2 Tax. Cas. 577; 16 R. 438.
 461, 474.

(2) (1884) 12 Q. B. D. 389, 400;
 14 Q. B. D. 239; (1885) 10 App. Cas.

(3) [1901] A. C. 26, 33, 46.

(4) [1907] A. C. 131, 133.

(5) [1901] A. C. 26, at p. 46.

a mode of taxation which gives it very nearly double what it would otherwise get, and it ought to stand by that mode. With regard to the trading account it is impossible to deny that but for the return from the investments, from which income tax has been deducted at its source, there would be a deficit. Moreover, it was proper business to pay the annuities out of money which had already paid the tax. Also, in applying the Act of 1888, you are bound to look at the proper businesslike way of appropriating revenue to the expenses. Further, the Crown, to support their claim, must prove affirmatively that in point of fact these annuities were paid out of money which had not already paid duty.

Even if the liability were a question of proportion, there could not be a proportion between the four items "Premium Income," "Consideration for Annuities," "Assignment and Transfer Fees," and "Profit on Investments realized."

The decision of the First Division so far as it directs a remit should be recalled, and the judgment of the Lord Ordinary assailing the appellants ought to be restored.

Sir W. S. Robson, A.-G., and Ure, L.A. (with them *Umpherston*) (the two latter of the Scottish Bar), for the respondent. The question is whether the annuities were paid out of profits and gains brought into charge within the meaning of s. 24, sub-s. 3, of the Act of 1888. The revenue account shews that the appellants have received in rough figures during the five years 2,500,000*l.* Of that amount one-third—the 804,731*l.*—has paid income tax. On balance, except on the 804,731*l.*, there has been no tax paid, and the Crown submit that they are entitled to treat one-third of the money paid by the company to the annuitants as being paid out of money "already brought into charge," and two-thirds as not; that is, of the 5809*l.* they can only retain one-third as having been paid in respect of money brought into charge. The premiums received by the company are by the nature of the transaction mere trade receipts, and it is a fallacy to affirm that they are capital payments. Of course in making out a profit and loss account part of the receipts must be appropriated to replace capital. But the question here is not one of ascertaining profit and loss, but of ascertaining whether these annuities have been paid out of a general fund or

H. L. (Sc.)

1909

 EDINBURGH
LIFE
ASSURANCE
COMPANY

v.
LORD
ADVOCATE.

H. L. (SC.) 1909
 EDINBURGH LIFE ASSURANCE COMPANY
 v.
 LORD ADVOCATE.

out of some special fund which is entitled to claim the benefit of the exemption in respect of income tax. Article 28 (1) of the co-partnership gives no charge upon any special property to the annuitants. That distinguishes this case from *London County Council v. Attorney-General* (2), where the county council gave to the holders of the consolidated stock a distinct and specific charge upon the property of the London County Council. In view of the clear directions in article 32 (3) it cannot be maintained that the premiums are sums which it is improper to devote towards the payment of the expenses of carrying on the business. The question here is not what profit has been made for the purpose of charging income tax, but upon how much of the revenue of the company has income tax been paid. For that purpose it is necessary to find out what is the revenue and what are all the sums which are proper to be used in payment of the expenses of the business. The question is, can the company maintain that, in their arrangements in the ordinary course of their business, the sum received upon which income tax had been paid was in fact and truth appropriated to a particular payment? Was the 804,731*l.* as a matter of fact appropriated to the payment of these annuities? The company put aside the premiums to form an assurance or annuity fund to meet all claims and defray all expenses of carrying on the business. If they had not used the premiums for this purpose they could not have started at all, as they had no other revenue during the first year. It follows that these premiums in no sense whatever can be treated as mere capital. In the absence of any specific appropriation of the money the company have received by way of interest and dividends on which income tax has been paid, they can only be taken to have paid such money in proportion to the fraction which that money constituted of the sum out of which it was derived. Article 34 shews that the company are bound to gather the whole of their receipts, premiums and everything else, into one general fund, from which they were to draw out of that the sums required for the payment of the annuities. There

(1) See post, p. 154.

(2) [1901] A. C. 26.

(3) See post, p. 161.

ought, therefore, to be an apportionment; one-third of the money payable paid to the annuitants will come out of interest, for interest constitutes one-third of the general fund, and two-thirds of the money so payable will be taken from the premiums, because the general fund to the extent of two-thirds consists of premiums. The evidence proves that this mode of payment is according to the course of business. The Crown is not endeavouring to tax the company twice. The income tax deducted from the annuities is the income tax of the annuitants, and not that payable by the company. The fact that the appellants are making a loss on their general trading account does not entitle them to retain part of the money which they have collected on behalf of the Crown. The words of the special exemption or privilege are that to the extent to which the company has paid these annuities out of money which has already been brought into charge they shall be allowed, as a special limited privilege, to retain an equivalent of the amount of the income tax which they have collected on behalf of the Crown, but no more. If s. 24, sub-s. 3, of the Act of 1888 was not in existence the appellants could not have deducted the tax, and the annuitants would have had to pay it directly to the Government.

The Crown contends that nothing the appellants could do with their books would make any difference. If they chose to say "We are going to keep our books so as to shew that the 804,731*l.* interest is carried to a separate account and goes straight to the payment of annuities," the Crown would still contend that that was not in accordance with the proper and necessary methods of carrying on their business. That would no more be permitted than it would be to a bootmaker to say "I am keeping here a capital account, and I am going to replace my capital by means of a separate account, and whatever I put in that account is to be free from income tax." If the books here shewed that the 804,731*l.* was put to a separate account to be used in payment of annuities, the Crown would say "That is not the truth; that is a form of book-keeping adopted to bring yourselves within the exemption, because you know perfectly that in the early years when you would have to pay the annuities you could not help paying them out of the premiums." The 804,731*l.* is charged

H. L. (Sc.)

1909

EDINBURGH
LIFE
ASSURANCE
COMPANY
v.
LORD
ADVOCATE.

H. L. (Sc.)
1909
EDINBURGH
LIFE
ASSURANCE
COMPANY
v.
LORD
ADVOCATE.

income tax as being dividends from money invested in other businesses. It is only paying income tax upon the profits upon the businesses other than insurance; therefore there is no hardship at all. The fact here is that the manager of the appellants says he is doing nothing so foolish as to pay the annuities out of capital; he is paying them out of trade receipts, both revenue and capital; and the judges have said nothing contrary to that in any of the cases: *Last v. Northern Assurance Co.* (1), where the question whether premiums were to be treated as profits or trade receipts did not touch the question here, which is whether a particular source of income is to be treated purely as capital or whether it is to be treated as revenue, and therefore to be appropriated to the payment of obligations as any other source of revenue. This appeal deals with two entirely separate and distinct incomes, the income of the annuitants and the income of the insurance company. But for the Act of 1888 the annuitants would have been required to pay the 5809*l.*, unless they could shew that their respective income only amounted to 160*l.* It was still open to any one of these annuitants to do so, and the result may be that the whole of the 5809*l.* might be required to be refunded to these annuitants by the Crown. The appellants say they are not bound as statutory collectors to pay over this 5809*l.* to the Crown, but the appellants, as statutory collectors of taxes, can only refuse to pay that income tax by shewing two things—(1.) that these annuities were legally payable out of moneys which were brought under charge already, and (2.) that they have in point of fact paid income tax upon these moneys. It is not sufficient for them to say “We have used our income for other purposes altogether, and we have not attributed it to these annuities, but we could have done so if we had chosen.”

Premiums have never been regarded by anybody and are nowhere said by any judge to be payments of capital. They are always said to form part of the revenue of the company, part of the income of the company, out of which they pay their money obligations. This is shewn by considering this company to be in the same position as the Gresham

(1) 12 Q. B. D. 389, 400; 14 Q. B. D. 239.

Company. (1) [They referred to *London County Council v. H. L. (Sc.) Attorney-General*. (2)]

Scott Dickson, D.F., in reply.

1909
 EDINBURGH
 LIFE
 ASSURANCE
 COMPANY
 v.
 LORD
 ADVOCATE.

The House took time to consider their judgment.

Dec. 9. LORD ATKINSON. My Lords, in this case the Lord Advocate for Scotland filed an information against the defendant company to obtain an account of the income tax deducted by them from annuities payable by them, and also to recover, on behalf of the Commissioners of Inland Revenue, payment of a sum of 5809*l.* 3*s.* 7*d.* alleged to have been deducted by the company in respect of income tax from certain annuities, amounting to 116,259*l.* 13*s.*, paid by them from April 5, 1905, to November 30, 1907.

The question for decision turns on the true construction of s. 24, sub-s. 3, of the Inland Revenue Act of 1888.

The defendant company carries on the ordinary business of a life insurance company, including the selling of the annuities, both immediate and deferred. The immediate annuity is purchased by the payment to the company of a lump sum; the deferred annuity either by the payment of a lump sum or of a series of instalments.

The income of the company consists of (1.) interest on investments, dividends, and rents, a considerable sum, upon which income tax is deducted at its source; (2.) premiums for life insurances; (3.) the purchase-money of the annuities; and (4.) a small sum representing transfer fees, &c.; while the company's outgoings consist of (1.) claims on policies; (2.) surrenders of policies; (3.) annuities; (4.) expenses of management, including commissions; (5.) income tax; and (6.) dividends to shareholders.

The financial position of the company is best shewn by the result of their operations during the five years ending December 31, 1907. Their total receipts during that period amounted to 2,515,113*l.*, of which nearly one-third, 804,731*l.*, represents interest, dividends, and rent, on which income tax is deducted at

(1) [1892] A. C. 309.

(2) [1901] A. C. 26.

H. L. (Sc.) the source, while their expenditure, including a sum of 207,567*l.*,
 1909 actually ascertained, to meet increased liabilities, amounted to
 EDINBURGH 2,170,663*l.*, leaving a net surplus of 334,450*l.*, so that if the sum
 LIFE of 804,731*l.* were not brought into account and applied by the
 ASSURANCE company to meet its liabilities, there would be a deficit on the
 COMPANY company to meet its liabilities, there would be a deficit on the
 v. five years' trading of 470,281*l.*
 LORD

ADVOCATE. No formal appropriation of the interest from these investments
 Lord Atkinson. in the books of the company is made, nor is any particular fund
 set apart, earmarked, or specially charged with the payment of
 these annuities, but, as the before-mentioned figures demonstrate,
 these annuities must, since they have been paid in full, have
 been paid in part out of this sum of 804,731*l.* so brought into
 account. The income of the company from all sources is treated
 as paid into a common fund, from which all outgoings are dis-
 charged. And by the 28th article of the contract of co-partnership
 of the company; it is provided, amongst other things, that every
 policy of insurance or other obligation entered into by the directors
 for the behoof of the company shall contain a clause declaring that
 the capital stock and funds of the company for the time being
 shall be the only fund answerable for any demand under such
 policy or other obligation. Such a clause is invariably inserted
 in these documents as directed by this article.

These facts are not disputed. An account in a particular form
 had been furnished to the Inland Revenue, and therefore the real
 object of the action is the recovery of this money demand. From
 the accounts furnished it is clear that had the company been
 assessed upon their trade profits for the five years ending
 December 31, 1907, the Inland Revenue would have received
 from them income tax on 334,450*l.*, and have received from the
 annuitants income tax upon 218,463*l.*, making together the sum
 of 552,913*l.* The Inland Revenue did not take that course; they
 collected the tax upon the company's investments, the company
 returning its net profits each year under Rule No. 1, Case 1, of
 Sched. D, as "nil," with the result that they have already
 received income tax on a much larger sum (a sum amounting
 after deducting the tax to 804,731*l.*) than they would have
 received had they taxed it on its profit. And if the contention
 on which their present claim is based be sound, they would be

entitled to receive income tax on the amount of the annuities paid, namely, 218,463*l.*, besides ; that is, income tax on over 1,023,194*l.*, instead of on 552,913*l.* But whether this contention be sound or not, it is obvious that the Inland Revenue have taken the course most profitable for the Crown and most burdensome to the subject. They cannot assess the company on one basis and call them to account upon another. It is assumed that the company make no net profits, and the Crown must admit that, even if the fact were so, it would not affect the validity of their claim, or the question to be decided.

H. L. (Sc.)
1909
EDINBURGH
LIFE
ASSURANCE
COMPANY
v.
LORD
ADVOCATE,
Lord Atkinson.

The Lord Ordinary decided in favour of the company. The Commissioners appealed to the First Division, contending before both tribunals that these annuities could not be treated as in whole or part paid or payable out of gains and profits brought into charge. That contention was rejected by both Courts, but the First Division, by their decree dated March 9, 1909, found "That the annuities paid by the defenders in every year fall to be debited proportionally against their revenue on which income tax has been paid and their revenue upon which income tax has not been paid in each year," and, further, that the defenders were bound to account for the portion of the annuities paid out of revenue which had not paid income tax, and remitted the case to the Lord Ordinary to fix the amount of income due on those findings.

From this decree the company have appealed to your Lordships' House. The respondents now endeavour to support their decree on grounds entirely inconsistent with those on which they relied in the Scottish Courts. They now admit, as indeed they must admit in order to hold their decree, what before they strenuously disputed, namely, that the income from these investments of the company are "profits and gains brought into charge" within the meaning of the 24th section of the Act of 1888. But they contend that as the annuities are not made a special charge on any particular fund belonging to the company, and are in fact paid out of a mixed fund, the payments must be ascribed to the whole sources of income in the proportions which each source of income bears to the whole income.

It cannot be disputed that the annuities, though not exclusively

H. L. (Sc.) charged upon this taxed income, are payable out of it, in the sense that they are charged upon it, may legitimately and properly be paid out of it, and can be paid out of it in fact, as it is ample to meet them.

1909
EDINBURGH
LIFE
ASSURANCE
COMPANY

v.
LORD
ADVOCATE.

Lord Atkinson.

The case of *London County Council v. Attorney-General* (1) resembles the present case in this, that stock A issued by the council and the dividends upon it, and the sums required to form a sinking fund, were charged upon all the property of the council together with the rates. It differs from the present case, however, in this, that the income of the council liable to income tax was less by many thousands of pounds than the interest paid to the stockholders; and it necessarily followed that stockholders to a considerable amount must have been paid out of non-taxed income, namely, the rates.

The case was clearly covered by the concluding portion of the 24th section. The council were quite willing to pay the income tax deducted on the interest so paid out of the *rates*, but claimed the right to retain the income tax deducted on the interest paid out of the tax-bearing portion of their income. The claim of the Crown in that case, as originally in this, was based upon the contention that the income of the council derived from their property as distinguished from the rates was not "gains or profits brought into charge to the income tax payable under Schedule D" within the meaning of s. 24; and alternatively in that case, as now in this, that the interest payable to the stockholders was a charge upon a mixed fund comprising the income from their property and the rates, that only a portion of that fund could be brought into charge to the income tax under Sched. D, and that consequently only a rateable proportion of the dividends on the stock could be treated as payable out of "profits or gains brought into charge."

The decision of your Lordships was against the Crown on both these points. In dealing with the second, Lord Macnaghten (2) expresses himself thus: "That is an ingenious, but not, I think, very business-like suggestion. It is enough to say that it is the plain duty of the council, not being beneficial owners of the funds which they administer, to keep down annual charges

(1) [1901] A. C. 26.

(2) [1901] A. C. 26, at p. 33.

out of annual income as far as it will extend." Lord Davey (1) deals with the latter contention, thus: "On the second point it is difficult to express oneself with becoming respect. The contention is that as the interest on their consolidated stock is charged upon the whole lands, rents and property belonging to the corporation and on their rates, such interest ought, for the benefit of the Crown, to be apportioned rateably over all subjects of the charge, and only a rateable proportion deemed to be paid from rents or from interest receivable by them from their own debtors. The proposition has the merit of novelty; admittedly there is no authority for it. The attention of your Lordships has not been called to any statutory enactment directing such procedure, or to any principle of law which prescribes it. On the contrary, the general principle of payment in due course of administration is to pay annual charges in the first place out of annual income. It is not required by the Income Tax Acts, in order to raise the right of deduction and retention, that the interest on annual payment should be exclusively charged or payable out of profits or gains brought into charge. It is enough if the interest is charged upon or payable out of the taxable income, though there may be other subjects of charge." With this reasoning the other Lords concurred.

The feature which, in addition to the insufficiency of the tax-bearing income to pay all the claims upon it, distinguishes that case from the present is that there the taxed income had been set apart as a separate fund, and the interest and dividends on which the income tax required to be returned had been paid were, in fact, paid out of the fund so set apart. The question is whether a manipulation such as that by the company of its funds, a setting apart of less than one-third of their taxed income, to pay these annuities, which they can any day readily accomplish, and which if done could not have any effect on their balance-sheet or financial position, is a condition precedent which must be performed in order to entitle them to retain under the provisions of s. 24 of the Income Tax Act of 1888 the sum deducted and now sued for.

In my opinion, where annuities such as these are charged upon

(1) [1901] A. C. 26, at p. 46.

H. L. (SC.)
1909
EDINBURGH
LIFE
ASSURANCE
COMPANY
v.
LORD
ADVOCATE.
Lord Atkinson.

H. L. (Sc.)
 1909
 EDINBURGH
 LIFE
 ASSURANCE
 COMPANY
 "F."
 LORD
 ADVOCATE.
 Lord Atkinson.

a tax-bearing fund amply sufficient to pay them in full, though not set apart for that purpose, they cannot be held to be "not payable" or "not wholly payable" out of gains and profits brought into charge within the meaning of the 24th section. For the purposes of that section I think that the interest on annuities charged upon the tax-bearing fund must under such circumstances be treated as payable out of that fund, so far as it will reach. If the taxed fund be insufficient to pay all the interest and annuities, then the income tax deducted on the interest or annuities not satisfied out of it must be accounted for. In short, I attach no special virtue to the manipulation of the funds of a corporation, in the manner above mentioned, as a means of escape from a liability to income tax. To do so would in effect be, I think, to lose sight of what appears to me to be one of the main objects, if not the main object, of the section, namely, to avoid obliging a subject to pay income tax twice over on the same sum. That object would, in the result, be defeated if the subject were obliged first to pay income tax on a given fund, and then to pay income tax on sums properly payable out of it simply because he had omitted formally to dedicate the funds specially to that use, and formally to pay those sums out of it.

On this ground I think the appeal in this case should be allowed. But if I were of a contrary opinion I should have great difficulty in determining what, for the purposes of the decree, is to be taken to be the "revenue of the company which has not paid income tax," or on what basis it is to be ascertained. The case of *Gresham v. Styles* (1) establishes that, in order to ascertain what are trade profits for the purposes of taxation under the Income Tax Acts antecedent to this Act of 1888, annuities such as those paid in this case cannot be treated as paid out of profits and gains "brought into charge" to the tax; and, e converso, that the amount paid by the annuitant in respect of them, that is, the amount paid to purchase them, whether in a lump sum or by instalments, cannot be taken in its bulk as such "profits or gains" either, but that the expenditure, including these annuities, must be deducted from the receipts to ascertain the

(1) [1892] A. C. 309.

net profits, upon which alone income tax is to be levied. In this case the company has been taxed on the assumption that its net profits are nil; and it is admitted that s. 24 is merely a machinery section, neither extending existing charges nor imposing new ones. The rates levied by the London County Council bear no analogy whatever to the sums paid to purchase these annuities, nor indeed, it would appear to me, to the premiums on ordinary policies of life insurance either. The rates are income in the ordinary sense. The price received by a trader for the goods he purchases and then vends is to a great extent capital, and is not to be treated as income, or "gains or profits," for the purpose of the Income Tax Acts; yet, by the decree, the annuities are to be apportioned between receipts in their nature portions of capital, and the income from investments, as if they were two ascertained portions of revenue as distinguished from capital, income tax being leviable on the one and not on the other, while it is admitted that these receipts might be very considerable, and yet the net profits made by the trading, apart from the income from investments, be nothing or less than nothing. In the view I take on the other points raised it is unnecessary for me to determine what is the true principle upon which the account directed should be taken, but I own, with all respect to the learned judges of the First Division, I think great injustice might result from the application of the principle on which the decree appears to be based.

As I have already said, I think this appeal should be allowed with costs against the Crown.

LORD GORELL. [His Lordship, having given the facts as above, continued:—]

My Lords, the question depends upon the meaning and effect of s. 102 of the Property Tax Act, 1842, s. 40 of the Property Tax Act, 1853, and s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888. I need not trouble your Lordships by a full statement of these sections and of their operation, because I find on reading the judgments delivered in the case of *London County Council v. Attorney-General* (1), to which your Lordships

(1) [1901] A. C. 26.

H. L. (Sc.)
1902
EDINBURGH
LIFE
ASSURANCE
COMPANY
v.
LORD
ADVOCATE.
Lord Atkinson.

H. L. (SC.) 1909
 EDINBURGH LIFE ASSURANCE COMPANY
 v.
 LORD ADVOCATE.
 Lord Gorell.

were referred in the course of the arguments in the present case, that Lord Macnaghten has examined these sections very fully. (1) He points out how they authorize a person who has paid income tax on what is not really available income, because it includes money which he has to pay over to some one else, to deduct and retain the tax upon that payment.

To understand the effect of s. 24, sub-s. 3, of the Act of 1888, which was so much discussed in argument before your Lordships, it is necessary to refer back to s. 102 of the Act of 1842, which charges with tax "all annuities" and other annual payments whether they are payable . . . "as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract." Then follows the proviso that "in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act no assessment shall be made upon the person entitled to such annuity, interest or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment without distinguishing such annual payment, and the person so liable to make such annual payment, whether out of the profits or gains charged with duty, or out of any annual payment liable to deduction, or from which a deduction hath been made, shall be authorized to deduct out of such annual payment at the rate of," &c. It will be seen further on in the section that in cases where the annual payment was not payable out of profits or gains brought into charge the payment was charged in the hands of recipient. The change made by s. 40 of the Act of 1853 is explained in the judgment referred to. Deduction of the duty was authorized in the case of every annual payment either as a charge on any property or as a personal debt or obligation by virtue of any contract.

Sect. 24, sub-s. 3, of the Act of 1888 made the deduction compulsory in all cases, and the person making the annual payment is bound to account to the Crown for the amount deducted,

(1) [1901] A. C. 26, at pp. 38—40.

unless the annual payment is payable out of profits or gains brought into charge. H. L. (Sc.)

The first question, then, in the present case is whether the annuities were payable by the appellants out of profits or gains brought into charge.

The form of annuity bond granted by the appellants is given at p. 23 of the record, and according to this the funds of the company and the capital stock, so far as not paid up at the time, are alone answerable for any claim or demand under or by means of an annuity bond.

The funds of the company, according to the articles of co-partnership, are the paid-up capital; sums appropriated to the proprietors by way of profit; and the interest, dividends, and accumulations thereof. They also include all premiums and other sums to be received for assurances, &c., and the interest, dividends, and accumulations thereof respectively, which (article 32) are to form a separate fund called "the Assurances and Annuity Fund," which fund is to be in the first instance the fund for answering all claims and demands on the company in respect of its assurances or otherwise, and for defraying the expenses of carrying on the business of the company.

The annuities are in my opinion payable, within the meaning of the Acts, out of the interest, dividends, and rents received by the company from which income tax is deducted before the moneys are received by the company—they are payable out of profits or gains brought into charge by virtue of the Acts. But they are not payable out of these profits and gains exclusively, and the question appears to be whether that prevents the company from having the right of deduction and retention to the extent which they claim.

The contention was raised in the case above referred to that as the interest on Metropolitan stock was charged on all the property of the council—capital and income alike—and on their rates, such interest ought for the benefit of the Crown to be apportioned rateably over all the subjects of the charge, and only a rateable proportion deemed to be paid out of income from rents or from interest received by them from their own debtors. This

1909
EDINBURGH
LIFE
ASSURANCE
COMPANY
v.
LORD
ADVOCATE.
Lord Gorell.

H. L. (Sc.)
 1909
 EDINBURGH
 LIFE
 ASSURANCE
 COMPANY
 v.
 LORD
 ADVOCATE.
 Lord Gorell.

contention was rejected. Lord Davey said: "The general principle of payment in due course of administration is to pay annual charges in the first place out of annual income. It is not required by the Income Tax Acts in order to raise the right of deduction and retention that the interest on annual payments shall be exclusively charged upon or payable out of profits or gains brought into charge. It is enough if the interest is charged upon or payable out of the taxable income, though there may be other subjects of charge. But the mortgagor cannot, of course, retain against the Crown more income tax than he has paid. One of the learned judges in the Court of Appeal seems to have thought the case might be different if the county council had made some appropriation of their funds, though it is difficult to see how any account-keeping by the debtor could alter the rights of the Crown." The point there decided, upon which these remarks were made, no doubt was affected by the difference between capital and income, in due course of administration, but when the terms of the Acts and the object to be effected are considered in relation to such a case as the present, it would seem that the principles indicated in that judgment should also apply where money, out of which annual payments are payable, is derived from two sources, that coming from one being charged with income tax, while that coming from the other is not so charged.

The Acts are drawn in general terms to meet various cases, but their application which is thus suggested to the present case produces the result which would seem to have been intended to be reached in such cases by taxing at the source; for although the 804,731*l.* for interest, dividends, and rents is not really available income, the Crown receives the tax on the whole of that sum, and the company only get back the tax on 218,463*l.* If they also have to account for the tax on rather more than two-thirds of the latter sum, there will be a payment twice over on that account. There does not seem to be any authority applicable to this case for the proposition on which the learned judges of the First Division acted, that because there are two funds practically charged with the payment of the annuities, the liabilities must be apportioned rateably between them. The

appellants may pay the annuities out of which funds they please, and the question of their rights and liabilities with regard to the Crown must depend on the sections of the Acts above referred to, according to which the tax may be deducted and retained, although the annuities are not payable exclusively out of the taxable income of the company.

But then it was argued for the respondent that it has not been shewn that the annuities have been paid out of the taxable income. This argument would seem to make the rights of the Crown depend upon the book-keeping of the company; but this cannot be, nor do I think the liabilities of the company can be made to depend upon their system of accounts. This argument could hardly be open if the company had, in fact, kept the interest, dividends, and rents from their investments apart from their other moneys and paid the annuities out of the former. Can it then make any difference to their rights and liabilities if they choose to mix the funds for the purpose of their accounts and pay thereout whatever sum is necessary to discharge their liabilities to the annuitants?

It may be that, as Lord Macnaghten said in the above case (1), in commenting on the change of language in s. 24, sub-s. 3, of the Act of 1888, from "payable" to "paid" so far as interest of money or "annuities chargeable under Schedule D are in fact paid out of profits or gains 'brought into charge,' whether in law payable thereout or not, the person who makes the payment and deducts the rate of income tax is not accountable to the Crown for the duty deducted." But it does not appear to me to follow that where the annuities are payable out of profits or gains brought into charge it is necessary to use in paying the annuities the actual moneys received in respect of the profits or gains in order to obtain the benefit of the deduction and retention. In the case of a business like the appellants' and taking into account the language and object of the three Acts, it seems to me that if the annuities are made payable out of the interest, dividends, and rents charged with the tax it is immaterial whether the money to pay them is taken out

H. L. (SC.)

1909

EDINBURGH
LIFE
ASSURANCE
COMPANY

v.
LORD
ADVOCATE.

Lord Gorell.

(1) *London County Council v. Attorney-General*, [1901] A. C. 26, at p. 34.

H. L. (Sc.) of the general till of the company or not, provided that it
 1909 does not exceed the amount of income on which tax is charged.

EDINBURGH I am of opinion that the appeal should be allowed and the
 LIFE interlocutor of the Lord Ordinary restored with costs here and
 ASSURANCE in the First Division.
 COMPANY

v.
 LORD
 ADVOCATE.

LORD ASHBOURNE. My Lords, in this case I concur in the opinions which have been delivered by my noble and learned friends.

LORD GORELL. My Lords, in the case *Attorney-General v. Till* (1), which was before your Lordships recently, your Lordships were referred to a statute in which it was stated that costs in revenue cases were to be allowed as between subject and subject. I should presume, therefore, that in this case, unless there are some exceptional circumstances, the costs would be awarded as in an ordinary case.

LORD LOREBURN L.C. I agree on the question of costs. We certainly have, at all events recently, awarded costs for and against the Crown in revenue cases. I do not know whether it is desired to argue any point or to make any submission on behalf of the Crown.

Sir R. B. Finlay, K.C. Unfortunately, neither the Attorney-General nor the Lord Advocate is able to be here. The Lord Ordinary gave the company costs. In the First Division his order was varied, and it was decided that there should be no costs. What I ask your Lordships is that we should have the costs here and below in the ordinary way. The statute which deals with the point is the 22 & 23 Vict. c. 21, s. 21. The effect of it is given in Dowell's Income Tax Acts, p. 84 : "The costs in all proceedings and interlocutory matters on the revenue side are to be adjudged as between subject and subject. In *Attorney-General v. Countess Blucher de Wahlstatt* (2) it was held that in revenue cases, where decrees were pronounced for the Crown or defendant, costs followed the event unless otherwise ordered."

(1) Ante, p. 50.

(2) (1864) 3 H. & C. 390.

Umpherston. I am instructed to say that the Crown do not desire to raise any point upon this question of costs. H. L. (Sc.)

1909

Ordered that the interlocutor appealed from be reversed; that the Lord Ordinary's interlocutor be restored; and that the respondent do pay to the appellants their costs here and below.

EDINBURGH
LIFE
ASSURANCE
COMPANY
v.
LORD
ADVOCATE.

Lords' Journals, December 9, 1909.

Agent for appellants: *Charles M. Barker, for Mackenzie & Kernack, W.S., Edinburgh.*

Agent for respondent: *Sir Francis C. Gore, Inland Revenue, England, for Philip J. H. Grierson, Inland Revenue, Scotland.*

[HOUSE OF LORDS.]

SCREW COLLIER COMPANY	APPELLANTS;	H. L. (Sc.)
AND		1909
ISABELLA WEBSTER OR KERR	RESPONDENT.	Dec. 14.

Ship—Collision—Damages for Loss of Life—Ship in fault—Regulations for Preventing Collisions at Sea, art. 25—Firth of Forth a “narrow channel”—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 419.

The Firth of Forth from the Forth Bridge upwards is a “narrow channel” within art. 25 of the regulations for preventing collisions at sea.

APPEAL, with the assistance of nautical assessors, from the First Division of the Court of Session, Scotland. (1) The appellants and defenders were the Screw Collier Company and other owners of the steamship *Prudhoe Castle*, and the respondent and pursuer was Isabella Webster or Kerr (widow) for herself and her children. The question was whether or not the owners

H. L. (SC.)
1909
SCREW
COLLIER
COMPANY
v.
WEBSTER
OR KERR.

of the *Prudhoe Castle* were liable to pay compensation to the widow and children of the deceased George Kerr, who at the time of his death was master of the steamship *Ruby*. The *Prudhoe Castle* and the *Ruby* were in collision in the Forth, above, namely, to the west of, the Forth Bridge, at a point between the Dodds buoy and the Beamer light, on October 10, 1905. As a result of the collision the master of the *Ruby* was drowned along with several others of the crew. Following on the collision, cross-actions for loss and damage were raised by each of the vessels against the other, and on February 8, 1906, after proof, the Lord Ordinary (Lord Salvesen) pronounced an interlocutor finding both the vessels to blame. To this interlocutor the Second Division of the Court of Session on July 19, 1906, adhered, and the judgment was affirmed. Subsequently, on July 1, 1907, the present pursuer and respondent raised the present action against the appellants, and the points to be decided were (1.) whether those in charge of the *Prudhoe Castle* were in fault in respect that they had committed a breach of art. 25 of the regulations for preventing collisions at sea, in force since 1897, and (2.) if those in charge of the *Prudhoe Castle* were in fault, was the *Ruby* negligently navigated by her master (who was in charge) in such a way as to materially contribute to the collision?

Lord Salvesen, by whom the case was tried, on February 28, 1908, held that, as the Second Division had affirmed his previous judgment finding both vessels to blame, it followed that the deceased George Kerr, who was in charge of the *Ruby*, materially contributed by his negligence to the collision, and his representative, the respondent, therefore was not entitled to recover damages unless there was a difference between the rules in Admiralty and in Common Law Courts in such cases, and he held there was no such difference. Against this interlocutor an appeal was taken to the First Division, who (January 23, 1909) recalled the interlocutor of Lord Salvesen and gave decree against the defenders for a total sum of 690*l.* with interest.

The questions for decision were more or less questions of fact, but the case is reported because of the decision of the House as to the collision having occurred in a "narrow channel" within

the meaning of art. 25 of the regulations for preventing collisions at sea. (1) H. L. (Sc.)

1909

SCREW
COLLIER
COMPANY
v.
WEBSTER
OR KERR.

1909. Dec. 13, 14. *Scott Dickson, D.F.*, and *John G. Spens* (both of the Scottish Bar), were heard for the appellants and contended, first, that the *Ruby* was also to blame, and, secondly, that the evidence proved that the Forth was not a narrow channel west of the Beamer light above the Forth Bridge.

Walter T. Watson and *John Carmot*, for the respondent, were not heard.

LORD LOREBURN L.C. My Lords, I think it is quite clear that this judgment of the First Division ought to be affirmed. It is admitted that the *Prudhoe Castle* was to blame. It is suggested on the part of the *Prudhoe Castle* that the *Ruby* also was to blame. In the first place it is said that she did not keep a proper look-out. I am not sure that that is established, but it certainly is not established that, if it were so, that in any degree contributed to the collision. Then it is said that she ported when green to green at a wrong time. It was clearly her duty to port at the proper time, and the evidence taken as a whole seems to me to shew that she did so—that she steered a proper course and ported at the right time.

I have only further to observe that this must undoubtedly be regarded as a narrow channel. It seems very strange that there should be any doubt upon the subject, and I hope it will be clearly understood that in the opinion of your Lordships this is a narrow channel.

My Lords, it is quite unnecessary for me to go through the evidence, which has been most carefully sifted for us by the Dean of Faculty, because I agree with the criticisms and the judgment of the Lord President, and I cannot really usefully add anything upon the details to the opinions of the learned judges.

EARL OF HALSBURY. I concur.

(1) Art. 25 : "In narrow channels of the fairway or mid-channel which every steam vessel shall when it is lies on the starboard side of such safe and practicable keep to that side vessel."

H. L. (SC.)

1909

SCREW
COLLIER
COMPANYv.
WEBSTER
OR KERR.

LORD GORELL. My Lords, I concur with what has been said by my noble and learned friend on the woolsack.

I would only like to add this remark from my own point of view. I think it is perfectly clear that the collision occurred in a narrow channel, and that it occurred on the north side of that channel, and then, when one finds that the *Prudhoe Castle*, the down-coming vessel, was on her wrong side of the channel at the time of the collision under a starboard helm, it is very difficult indeed to see how the primary blame of this collision should have been other than on the part of that vessel.

Turning to the other ship—the *Ruby*—she would in her ordinary course come round the island with the lighthouse of which we have heard, and, following that course, would naturally get, if she followed it in the ordinary and proper way, to about the spot where this collision happened. In those circumstances it seems to me extremely difficult to impute any blame to her; and I agree with what the learned Lord President has said, that she ought to be exonerated entirely.

LORD ATKINSON. I concur.

LORD SHAW OF DUNFERMLINE. My Lords, I concur in the judgments of the Lord Chancellor and Lord Gorell. In this case the learned Lord President in giving judgment used the following language: “I propose that your Lordships should hold authoritatively, so that in the future there may be no doubt about it,—and in this matter I am agreed with the judgment which Lord Salvesen originally pronounced,—that the Forth from the Forth Bridge upwards is a narrow channel.” My Lords, I am glad that that authoritative pronouncement of the Court of Session has received the sanction of this House, and I agree with my noble and learned friend on the woolsack in hoping that that will be taken stock of by all concerned.

Interlocutor appealed from affirmed with costs.

Lords' Journals, December 14, 1909.

Agents for appellants: *Thomas Cooper & Co., for Boyd, Jameson & Young, W.S., Edinburgh.*

Agents for respondent: *Botterell & Roche, for Beveridge, Sutherland & Smith, S.S.C., Leith.*

[HOUSE OF LORDS.]

JOHN YOUNG	APPELLANT;	H. L. (Sc.)
	AND	1909
ROBERT KINLOCH AND ANOTHER	RESPONDENTS.	<u>Dec. 17.</u>

Highway—Right for Foot Passengers—Prescriptive Use—Accumulated Use attributable to two Roads—Substituted Roads.

By the law of Scotland, if it can be inferred from the evidence that a new road was taken as of right as a substitute for an old road, the years of use of both roads can be added together to make the prescriptive period.

APPEAL from the Second Division of the Court of Session, Scotland, dated June 3, 1909, reversing the decision of the Lord Ordinary (Lord Salvesen), dated June 3, 1908.

1909. Dec. 15, 17. *H. P. Macmillan* (with him *A. M. Mackay*) (both of the Scottish Bar) heard for the appellants.

T. B. Morrison, K.C., and *Hon. William Watson* (both of the Scottish Bar) heard for the respondents.

The House (LORD LOREBURN L.C. and LORDS ATKINSON and SHAW OF DUNFERMLINE) considered the question to be one of fact and saw no reason to disagree with the finding of the Lord Ordinary that the right of use over the road in question for foot passengers had been established.

Ordered that the interlocutor of the Second Division be reversed with costs here and below.

Lords' Journals, December 17, 1909.

Agents for appellant: *Faithful & Owen, for Davidson & Syme, W.S., Edinburgh.*

Agents for respondents: *Grahames, Currey & Spens, for Dundas & Wilson, C.S., Edinburgh.*

[PRIVY COUNCIL.]

J. C.*	RICHELIEU AND ONTARIO NAVIGATION	}	APPELLANTS ;
1909	COMPANY, OWNERS OF STEAMSHIP		
July 13 ; Oct. 29.	"PRESCOTT"		
	AND		
	G. B. TAYLOR, OWNER OF STEAMSHIP	}	RESPONDENT.
	"HAVANA"		

THE HAVANA.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

*Canadian Canal Regulations of May 1, 1895, s. 19 (d)—Construction—
Priority of Passage into Lachine Canal—Duty of Vessel lying by.*

The appellant vessel, a passenger steamer entitled to priority of passage under the Canadian Canal Regulations of May 1, 1895, was clearly to blame for a collision with the respondent's vessel which occurred at the entrance of the Lachine Canal in the harbour of Montreal:—

Held, that the respondent's vessel was not also to blame. It was not her duty under s. 19 (d) to move to some point not less than 300 feet from the entrance to the lock, for she was the only vessel about to enter, and even if she were waiting her turn the local conditions did not require her to lie by at that distance so long as there was accommodation at the wing walls where it was the practice to lie by.

APPEAL from a judgment of the Supreme Court of Canada (December 15, 1908) affirming a judgment of the Exchequer Court of Canada (May 22, 1908) by which it was found that the steamship *Prescott*, belonging to the appellants, was solely to blame under the circumstances stated in their Lordships' judgment for a collision with the steamship *Havana*, belonging to the respondent.

The collision occurred in the entrance of the Lachine Canal, in the harbour of Montreal, on July 2, 1907. Davies J., who delivered the judgment of the Supreme Court, said that the Court were all of opinion that there could be no possible doubt about the

* *Present* : LORD MACNAGHTEN, LORD COLLINS, LORD GORELL, and SIR ARTHUR WILSON. *Nautical Assessors* : ADMIRAL SIR ARCHIBALD L. DOUGLAS, G.C.V.O., K.C.B., and COMMANDER W. F. CABORNE, C.B., R.N.R.

Prescott being to blame for the collision both as regards her equipment and her navigation. As regards the *Havana* the Court held that apart from sub-s. (d) of s. 19 of the Canal Regulations no negligence could be imputed to the navigation or management of the *Havana*, and that on the facts of the case sub-s. (d) did not apply at the time the *Havana* was alleged to have infringed it, and that, if the sub-section was applicable, the *Havana* was within the exception providing that the rule should not apply where local conditions might otherwise require, and that she did not in the circumstances infringe the regulation. The Court considered it unnecessary to express any opinion on the question whether, if the *Havana* had committed a breach of the regulation, the breach did in fact cause or contribute to the collision.

J. C.

1909

RICHELIEU
AND ONTARIO
NAVIGATION
COMPANY
v.
TAYLOR.

Angers, K.C., and *Geoffrey Lawrence*, for the appellants, contended with reference to the said s. 19 (d) that the *Havana* was to blame in not reversing 300 feet below the entrance of the canal, which she had time to do, where the water was free and open, and there manœuvring so as to maintain her position. Even by reversing 30 feet and mooring on the barges at the end of the south wing wall she would have left the entrance to the canal free, and there would have been no collision. It was to her unskilful management that the collision was due.

Butler Aspinall, K.C., *Holden*, and *C. Robertson Dunlop*, for the respondent, were not heard.

The judgment of their Lordships was delivered by

1909

LORD MACNAGHTEN. This is an appeal from the Supreme Court of Canada.

Oct. 29.

The action which has given rise to the appeal was brought by the owner of the steamship *Havana*, a Lake freight steamboat, or "coarse freighter," as such boats are called in the Upper Lakes, to recover damages for injuries sustained in a collision with a passenger steamer called the *Prescott*. The action was tried before the deputy local judge for the Admiralty District of Quebec, assisted by a nautical assessor.

J. C. The trial judge, concurring with the assessor, found the
1909 *Prescott* solely to blame, and gave judgment on all points in
 favour of the *Havana*.

RICHELIEU
AND ONTARIO
NAVIGATION
COMPANY
v.
TAYLOR.

The collision occurred at the entrance of the Lachine Canal, in the harbour of Montreal, on July 2, 1907, about 7 P.M., while it was yet daylight.

The *Havana*, bound from Quebec to Erie with a cargo of pulp wood, was just about to enter the canal. Her bow had reached the north wing wall of the entrance to the south lock (No. 1), and she had landed two of her men on the wall for the purpose of making fast her lines, when the acting lockmaster ordered her to keep back and let the *Prescott* pass in first. The *Prescott* was coming up immediately behind the *Havana*, but her approach had not been noticed by those on board the *Havana*. She was entitled to priority of passage, ranking as a vessel of the "first class" under the definition contained in the Canal Regulations of May 1, 1895, made by the Governor-General in Council.

In obedience to the order of the lockmaster, the *Havana* reversed her engines and was going astern. The *Prescott*, without waiting for the *Havana* to get clear out of the way, "crushed past," as some of the witnesses expressed it, between the pier and the *Havana*, scraping hard against the fenders on the side of the pier and jamming the *Havana* against a lumber barge lying up against the south wing wall. She entered the lock at great speed. Some of the witnesses—lockmen who had been employed at the lock for ten years or so—deposed to the effect that they had never before seen a vessel going in so fast. And then, by some accident, owing to defects in equipment and to unskilful management, her speed was actually increased. She went on without stopping and crashed through the upper gates, bringing down the contents of the basin above. The rush of water swept her out of the lock and dashed her against the *Havana*, which had begun to move across to her former position as soon as the *Prescott* was clear of the lower gates.

On the appeal to the Supreme Court the learned judges were all of opinion that the *Prescott* was in fault. On that point they did not call upon the counsel for the *Havana*. But they were divided equally—three to three—on the question whether the

Havana was also to blame; and so the judgment of the trial judge was affirmed, and affirmed with costs.

The leading judgment in support of the decision of the trial judge was delivered by Davies J., with whom Idington and Duff JJ. agreed. There are no notes of the opinions of the learned judges who took the opposite view. The judgment of Davies J. is clear and concise, and their Lordships agree with it entirely.

On the appeal before this Board it was, of course, hopeless for the learned counsel for the appellants to contend that the *Prescott* was not in fault. Their argument was that under the Canal Regulations it was the duty of the *Havana*, when passed by the *Prescott*, to move to some point not less than 300 feet from the entrance to the lock. They said, what was very true, that if the *Havana* had not been there in the way she would not have been involved in the catastrophe.

The regulation on which they relied is sub-s. (d) of s. 19. It is in these words: "When several boats or vessels are lying by or are waiting to enter any lock or canal, they shall lie in single tier and at a distance of not less than three hundred feet from such lock or entrance, except where local conditions may otherwise require, and each boat or vessel for the purpose of passing through shall advance in the order in which it may be lying in such tier, except in the case of vessels of the first class to which priority of passage is granted as above."

Assuming that under the circumstances the appellants could shelter themselves under such a defence or counter-charge, the answer to their contention is very simple, as Davies J. points out.

In the first place, the conditions under which the regulation comes into operation were not present on this occasion. There were not several boats or vessels lying by or waiting to enter the lock. The lumber barge, which might have claimed to enter before the *Havana*, had waived her turn and was not going forward at the time. The only vessel then about to enter the lock was the *Havana*. In the next place, the local conditions do not require that vessels waiting to enter should lie by at the distance prescribed so long as there is accommodation at the wing walls. There are snubbing posts along both walls, and it

J. C.

1909

RICHELIEU
AND ONTARIO
NAVIGATION
COMPANY
v.
TAYLOR.

J. C. was proved that it was the recognized practice for vessels waiting
 1909 to enter the lock to lie up there. The south wall was occupied
 { by barges, but there was room against the north wall, and that
 RICHELIEU AND ONTARIO was the proper place for the *Havana* to wait for her turn. The
 NAVIGATION regulation in question was intended to preserve order among
 COMPANY vessels competing for entrance. It was not designed to secure
 TAYLOR. space and room for the erratic and dangerous movements of a
 — vessel over which those in charge lose all control.

The conduct of the *Havana* seems to have been proper in every respect, and such is the opinion of the nautical assessors.

Their Lordships will therefore humbly advise His Majesty that the appeal must be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for appellants : *Capel-Cure & Ball*.

Solicitors for respondent : *Botterell & Roche*.

[PRIVY COUNCIL.]

J. C.* RUSSO-CHINESE BANK DEFENDANTS ;
 1909 AND
 LI YAU SAM PLAINTIFF.
Oct. 27, 28 ;
Dec. 2. ON APPEAL FROM THE SUPREME COURT OF HONG KONG
 (APPELLATE JURISDICTION).

Liability of Bankers—Compradore's limited Authority as their Agent—Action against Bankers to recover Moneys improperly received by Compradore.

In an action by the respondent to recover from the appellant bank moneys paid to their compradore or Chinese agent at their Hong Kong branch for the purpose of a telegraphic transfer to the plaintiff's nominee at Shanghai it appeared that the compradore, to the knowledge of the plaintiff, had no authority without the express approval of the bank manager to receive the money or to fix the rate of exchange or other terms on which the transfer was to be effected :—

Held, that the bank was not liable for the compradore's misappropriation of the said moneys. His authority was limited to arranging the details of the proposed transaction and did not extend to receiving

* *Present* : LORD MACNAGHTEN, LORD ATKINSON, and LORD COLLINS.

money on account of the bank until a binding contract had been made with the bank manager. There had been no holding out through any negligent or improper act by the bank of the compradore as apparently invested with an authority greater than the limited authority which the plaintiff knew him to possess.

J. C.

1909

RUSSO-
CHINESE
BANK

v.

LI YAU SAM.

APPEAL from a judgment of the Supreme Court of Hong Kong (July 24, 1908) dismissing a motion by the appellants that judgment should be entered for them or alternatively a new trial ordered. The question was whether the respondent was entitled to recover from the appellants a sum of money which he had paid upon a consideration which had wholly failed to an officer of the defendants, called a compradore, employed in their bank.

It is the custom in China for European business and mercantile houses desirous of doing business with native customers to engage the services of a Chinese intermediary who is conversant with the European language used by his employers, as well as with the Chinese language, for the purpose of rendering communications possible between the native customer and the mercantile or business house, and to transact business with natives through such intermediary. This intermediary, who as a rule is the head of the Chinese staff of employees, is commonly known by the title of "compradore," and is commonly engaged upon the terms of a written agreement for the due performance of the obligations of which he gives security to his principal. In the present case there was such an agreement dated January 17, 1904, and security, but the security furnished by the compradore had been absorbed by losses.

The respondent's statement of claim alleged that on January 3, 1907, he requested the appellants and they agreed to transmit 30,000 taels to Shanghai, that he accordingly paid to them \$40,961.30 for that purpose, and that the appellants had never transmitted or repaid the money. The defence of the appellants denied the alleged request and agreement and receipt of the money. The details of the transaction, about which there was no dispute, are set out in their Lordships' judgment.

At the trial the Chief Justice in summing up made the following observation: "I say unhesitatingly that if a principal puts a compradore in such a position that he can commit fraud

J. C.
1909
RUSSO-
CHINESE
BANK
v.
LI YAU SAM.

without the principal taking proper precautions to prevent that fraud happening and if there is nothing in his conduct that creates suspicion on the part of the person defrauded the principal is liable. That I believe falls within the decision of the recent case of *Farquharson v. King*" (1) ; and, further, "the principal is not liable because he has put the agent in such a position that he can commit fraud, but because he has authorized him to do certain acts which he has done fraudulently." And in his judgment dismissing the appellants' motion the Chief Justice said : "It was strenuously insisted that as the plaintiff's manager knew that the compradore had no authority to enter into exchange contracts himself, he had practically given away his case. But the compradore never professed to enter into the contract himself : he did not even profess to enter into it for and on behalf of the bank with the manager's authority. What he did was to pretend to perform the formalities necessary for bringing about a contract between the plaintiff and the bank, being specially authorized to perform these formalities on similar occasions though not on this occasion. And the plaintiff did not imagine that he was entering into the contract with the compradore, nor with the compradore for and on behalf of the bank ; he imagined that he was entering into a contract with the bank, the necessary formalities for bringing about such contract having apparently been performed, as they always had been performed, by the person specially authorized to perform these formalities on similar occasions."

Scrutton, K.C., and *Mackinnon*, for the appellants, contended that upon the admitted facts the compradore had no authority from them to make a binding contract on their behalf such as that on which the respondent had sued. He could not do more than negotiate its details with any intending Chinese customer, and the conclusion of a contract required in every case the approval by the bank manager of the details so suggested and a special authorization from the manager to complete and carry into effect the contemplated contract. It was admitted that the respondent knew that the compradore's authority was strictly limited

(1) [1902] A. C. 325.

and did not authorize him to effect the contract sued upon or to receive for and on account of the appellants the money paid by the respondent. The compradore accordingly received the money on his own account and used it for his own benefit. *Farquharson v. King* (1) did not warrant the dictum of the Chief Justice in his summing up. The following cases as to agents with limited authority to bind their principals were referred to: *Stagg v. Elliott* (2); *Baines v. Ewing* (3); *Dawn v. Simmins* (4); *Bryant v. La Banque du Peuple*. (5) No question of holding out arises, for the respondent knew of the compradore's limited authority and had dealt with him on that footing in several transactions. The following authorities were referred to on that point: *Grant v. Norway* (6); *Chapleo v. Brunswick Building Society* (7); *Whitechurch v. Cavanagh* (8); *Ruben v. Great Fingall Consolidated*. (9) In *Hambro v. Burnand* (10) and *Bannatyne v. MacIver* (11) it was held that where an agent had borrowed money without sufficient authority an inquiry should be directed as to how much had been used for the defendants' purposes. See also *Swire v. Francis*. (12)

Duke, K.C., and *Nesbitt*, for the respondent, contended that by the terms of his service the compradore had authority to receive and take charge of all moneys paid to him or any of his staff for the use of the appellants. The jury must be deemed to have found to that effect, and a finding by a special jury familiar with the circumstances under which business is carried on between Europeans and Chinese and with all local conditions affecting the parties ought not to be disregarded, especially when approved by the Supreme Court. The appellants ought in fairness as between themselves and the respondent to bear the loss occasioned by their own insufficient control over the moneys received in the compradore's department. The compradore was permitted by them to appear to be sufficiently authorized to receive the moneys on account of a contract which he was expressly authorized to negotiate though not to conclude, and

J. C.

1909

RUSSO-
CHINESE
BANK

v.
LI YAU SAM.

(1) [1902] A. C. 325.

(2) (1862) 12 C. B. (N.S.) 373.

(3) (1866) L. R. 1 Ex. 320.

(4) (1879) 41 L. T. 783.

(5) [1893] A. C. 170.

(6) (1851) 10 C. B. 665.

(7) (1881) 6 Q. B. D. 696.

(8) [1902] A. C. 117.

(9) [1906] A. C. 439.

(10) [1904] 2 K. B. 10.

(11) [1906] 1 K. B. 103.

(12) (1877) 3 App. Cas. 106.

J. C. for the purposes of this case they are estopped from denying
 1909 that the receipt acknowledged by the proper bank official in the
 RUSSO- compradore's department was a receipt on their behalf for moneys
 CHINESE received for their benefit. Reference was made to *Hazard v.*
 BANK *Treadwell* (1); *Williams v. Innes* (2); *Thompson v. Bell* (3);
 v. *Barwick v. English Joint Stock Bank* (4); *British Mutual*
 LI YAU SAM. *Banking Co. v. Charnwood Forest Ry. Co.* (5)
Mackinnon in reply.

1909 The judgment of their Lordships was delivered by
 Dec. 2. LORD ATKINSON. This is an appeal from a judgment of the
 Supreme Court of Hong Kong, in its appellate jurisdiction,
 dated July 24, 1908, dismissing with costs the appellants' motion
 that judgment should be entered for them in an action in which
 they were the defendants, tried before the Chief Justice and a
 special jury on June 2, 1908, or, in the alternative, that the
 verdict found by the jury in favour of the plaintiff (the
 respondent) should be set aside and a new trial granted.

The plaintiff in the action is a native Chinese banker carrying
 on business in various parts of China, and having a branch at
 Hong Kong, which is managed on his behalf by one Lau
 Chung Yu.

The defendants (the appellants) are a corporation established
 under Russian law. They carry on banking business at various
 places, and, like the plaintiff, have a branch at Hong Kong,
 which, at the time the events happened out of which the action
 arose, was managed by one Ernest Freyvogel.

For the purpose of doing business with Chinese customers
 there was established a department in the defendants' Hong
 Kong bank, managed by a Chinese official styled a "compradore,"
 with the aid of two Chinese cashiers and an assistant, also
 officials of this bank and in its employ.

The powers, duties, and obligations of the compradore are
 enumerated and described in great detail in an indenture dated
 January 17, 1904, entered into by him with the bank for the

(1) (1722) 1 Str. 506.

(3) (1854) 10 Ex. 10.

(2) (1808) 1 Camp. 364.

(4) (1867) L. R. 2 Ex. 259.

(5) (1887) 18 Q. B. D. 714.

purpose of giving security to his employers for the faithful discharge of his duties.

In this deed it is expressly provided that "he is on no account to borrow or lend any money or security for money on account of the bank, or in any way to pledge the credit thereof, without the written consent of the manager, agent, or attorney for the time being in charge of the bank in Hong Kong first had and obtained." From the parol evidence given at the trial it is clear that the compradore had not any authority to receive on behalf of the bank from its customers any sums of money by way of deposits, or lodgment to the credit of their current account, or for the purpose of financing by anticipation contracts for what is styled in the case "telegraphic transfers" which might subsequently be entered into between the bank and those customers. The authority of the compradore as agent of the bank was limited in all these respects.

The action arose out of negotiations which took place on January 3, 1907, in respect of one of those so-called telegraphic transfers.

The nature of these transactions was this. A customer at Hong Kong, desiring that a certain sum of money should be paid to his nominee at Shanghai or other place at which the bank (the defendants) had an office, entered into a contract or arrangement with their Hong Kong branch that, in consideration of the payment by him to that branch of a sum which at the current terms of exchange at Hong Kong would represent the value there of the sum to be paid elsewhere, plus a certain profit to the bank, the latter undertook to arrange by telegraph for the payment of the sum specified at the place named to the customer's nominee.

In the case of a native Chinese customer like the plaintiff the negotiations leading up to the making of such a contract as the above were carried on through the compradore. The customer never came into contact with the manager, Mr. Freyvogel, and usually never saw the document which formed the basis of the contract, though it would be shewn to him if he asked for it. It was admitted that in all such transactions with the Hong Kong branch of the bank Mr. Freyvogel fixed the rate of

J. C.

1909

RUSO-
CHINESE
BANK
v.

LI YAU SAM.

J. C.
1909
RUSSO-
CHINESE
BANK
v.
LI YAU SAM.

exchange and the other terms upon which the matter was to be carried through, and that the compradore had no authority to fix the rate of exchange, or any of these terms, himself, or to enter into any contract for a telegraphic transfer without first consulting the manager. It was further admitted that the plaintiff had had with the defendants before January 3, 1907, many transactions similar to the one he then desired to enter into, and was fully aware of the before-mentioned limitations of the compradore's authority.

The Chief Justice in his judgment states with accuracy and clearness what was the course of dealing between the bank and a Chinese customer who applies through the compradore to transmit money by "telegraphic transfer" substantially as follows: "The compradore has no authority to fix a contract with a Chinese customer unless it has been expressly agreed to by the manager: when the details are so agreed by the manager the compradore is then authorized to fix the transaction, and a contract (A) has to be produced to the manager. The bank does not give the customer any writing in English to shew that the contract is made, but it is open to them to ask to see it. In the case of a 'ready' contract the bank does not insist on a contract signed by the customer; the contract (A) might therefore be written by the compradore out of sight of the customer. Then, the contract having been signed, the customer would have to bring the money, and fill up 'B' himself, or give the compradore the materials for filling it up: it is more usual in the case of Chinese customers for the compradore to fill up the form; he had in fact done so in all cases of transactions with the plaintiff."

It was not customary before January, 1907, for the bank to give, or the customer to ask for, any receipt or acknowledgment in English that the bank have received his money. Then B, having been filled in, is given to one of the European staff, and, on the compradore notifying the European staff that he has received the money, the telegram is sent and the slip C is made out.

The documents indicated by the letters A, B, and C were those which had been used on a previous occasion when the plaintiff

remitted money through the bank by telegraphic transfer, and were admitted to be in the usual form.

The first constitutes the contract with the bank, is initialled by the manager, Ernest Freyvogel, and is in the following form:—

J. C.
1909
RUSSO-
CHINESE
BANK
v.
LI YAU SAM

A. S.

“ A ”

22.2.08.

CONTRACT

our a/c.

No. 10/292

for delivery ready

E. F.

Bought from the Russo-Chinese Bank for account of
Messrs. Yee Sen Yuen.

Amount.	Usance.	On	Rate.	Remarks.
Tls. 20,000	t t	Shanghai	71 $\frac{3}{4}$	(E. F.)

Date 6th January, 1906.

(Signed) Ng Sau Gook,
Broker.

The second document, B, is a request to the bank to transmit the money by telegram. It is signed by the plaintiff on behalf of his principal, and contains a statement of the rate of exchange, and the arranged sum paid, and the document C is a mere book-keeping slip drawn up to enable the bank officials to enter up the transaction in its books.

The Chief Justice then proceeds to state, in their Lordships' opinion quite accurately, what is the true position of the compradore. The compradore, he says, is the bank's intermediary with Chinese customers. His duties are to make with them those contracts which the manager authorizes him to make, and none others. As the Chinese customers are usually seen only by the compradore, the manager's only means of knowing whether the latter accurately carries out his instructions consist in the written documents handed to him by the compradore. The authority given to the compradore only extends to arranging with the customers the details of the proposed transaction. When those details have been arranged, the contract embodying

J. C.
1909
RUSSO-
CHINESE
BANK
v.
LI YAU SAM.

them must be submitted to the manager for his approval. The manager would not recognize any contract which did not bear his initials.

It appears to their Lordships that it would be difficult to devise any method of transacting business of this character more calculated than that above described to afford no real protection to the Chinese customers of the bank, or to afford greater facilities to the compradore, its officer, to commit frauds upon these customers. It is not surprising that he availed himself of his opportunities.

The plaintiff's representative, Lau Chung Yu, whose testimony is uncontradicted, and whom there is no reason to disbelieve, described, according to the note of his evidence, the transaction of January 3, 1907, out of which the claim in this action arose, as follows:—

“I went to Russo-Chinese Bank, saw Ng Sau Gook, compradore. I told him I had 20,000 to remit. He said Yes, bank would remit. He wrote something in English on paper, then went to European office. Then came back at once. Bank would remit T.T. I was to bring money next day. He gave me a verbal price 73.125. This was between 3 and 4 P.M. He said if you want to remit more to-morrow, bring it round. Next day 10 A.M., I went round with tael 10,000 more. Compradore wrote something in English on paper and went to Taipan's office. He came back and told me 73.125. I agreed to buy at that rate. He told me to go home and get money and he would wire it. I went home and worked out the amount in \$41,002.30. Then returned to bank with that money, went straight into compradore's office and handed the money over to compradore. Counted it out himself, wrote down the price on a piece of paper in Chinese (Exhibit 3).

	41,002.30
Less commission	41.00
	40,961.30

“‘Less commission’ means, commission returned to the firm by the compradore. Compradores in all the banks allow this; sometimes more or less. Then he took 2 and 3 (i.e.,

Exhibits 2 and 3) and handed the bank notes to the cashier in compradore's department. Entry in 2 had already been written out by me. Cashier compared the notes with the amount and chopped it in the presence of compradore. I then went away with 2 and 3."

The document Exhibit No. 2, upon which much reliance has been placed by the respondent, is written in Chinese. Translated, it runs as follows:—

"THE YEE SIN YUEN KEE.

"Book for chopping payments of money.

"19th day (Tung Moon) 3rd January 1907.

"The Russo-Chinese Bank to receive Shanghai telegraphic (remittance) of the exact sum of taels 30,000.

"(Chopped) The accountant's department of the Russo-Chinese Bank of Hong Kong."

The compradore's visit to the manager was a mere pretence. In fact, he never communicated with him at all on the matter, but, having got possession of the plaintiff's money, applied it to his own purposes.

The plaintiff sued the bank to recover the money so paid to their agent, the compradore. The precise form of the action is not a matter of substance.

The case was tried before the Chief Justice and a special jury of six. The learned judge left to them the three following questions:—

(1.) Did the bank in fact instruct the compradore to transact exchange business with Chinese customers in any other way than by receiving special authority in each case to do so?

(2.) Was there such authority given in this case?

(3.) Did the bank put the compradore in such a position that he could pretend to the plaintiff that he had the necessary authority to receive the money; and, if so, did the plaintiff, believing he had that authority, hand over the money to the compradore in that belief?

He instructed them that he would assume they would answer the first two questions in the negative, but that, if they answered the third question in the affirmative, they should find a verdict for the plaintiff; if in the negative, for the defendants.

J. C.

1909

RUSSO-
CHINESE
BANK

v.

LI YAU SAM.

J. C. The jury found for the plaintiff for the full amount claimed,
1909 and must therefore be taken to have answered the third question
— in the affirmative.

RUSSO- Judgment was accordingly entered for the plaintiff upon this
CHINESE finding.
BANK
v.

LI YAU SAM.

— The bank moved the Supreme Court to have this verdict and judgment set aside and judgment in the action entered for them, or in the alternative that a new trial should be directed on the grounds of misdirection by the learned Chief Justice, that the verdict was against the weight of evidence, and on other grounds not necessary to particularize. On July 24, 1908, the Supreme Court, in its appellate jurisdiction, delivered the judgment appealed against, dismissing the appellants' motion with costs.

There is no dispute in the case as to facts, and little, if any, controversy as to the law. It is undoubted that a person who deals with an agent, whose authority he knows to be limited, as the plaintiff knew in this case, does so at his peril, in this sense, that should the agent be found to have exceeded his authority his principal cannot be made responsible. While the several authorities cited by Mr. Scrutton, from *Grant v. Norway* (1) down to *Ruben v. Great Fingall Consolidated* (2), establish, in their Lordships' opinion, the proposition that, in order that the principle of "holding out" should in any given case of agency apply, the act done by the agent, and relied upon to bind the principal, must be an act of that particular class of acts which the agent is held out as having a general authority on behalf of his principal to do; and, of course, the party prejudiced must have believed in the existence of that general authority and been thereby misled. In other words, if the agent be held out as having only a limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority, even though it be an act of that particular class, because, the authority being thus represented to be limited, the party prejudiced has notice, and should ascertain whether or not the act is authorized. In their Lordships' view, there is no evidence that the fraudulent compradore had,

(1) 10 C. B. 665.

(2) [1906] A. C. 439.

or was believed to have, or was held out as having, any authority beyond the strictly limited one already mentioned. He was authorized to arrange the details of the negotiations for the "telegraphic transfers" of money to be submitted to the manager for approval, but he had no authority to receive money for the purpose of such transfers until those details had been so submitted and approved of, that is, until a binding contract had been entered into by the manager on behalf of the bank to transmit the money on the terms approved of when received. The bank had not, by any negligent or improper act on their part, allowed the compradore to be apparently invested with an authority beyond or greater than the limited authority which the plaintiff knew him to possess. Everything which he was by them permitted to do from the beginning to the end of the business was as consistent with the exercise of this limited authority as it was with the exercise of a wider or more general authority. There cannot therefore be any estoppel as against the bank in respect of any of the steps in the transaction, since they have not done or permitted anything by which the plaintiff was deceived.

It was contended by Mr. Duke on behalf of the respondent that in dealings such as those which took place in this case with the Chinese customers of the bank the compradore was the alter ego of the manager, and that, as the plaintiff's money had admittedly been handed to him, and the receipt of it acknowledged on the face of Exhibit 3 by the proper bank official in the compradore department, it must be taken, for the purposes of this case, to have been received by the bank, is now held by them, and should be returned to the plaintiff. Their Lordships think, for the reasons already stated, that this contention cannot be sustained. On the whole they are of opinion that there was no evidence to support the finding of the jury on the third question left to them, that the appellants were therefore entitled to have the judgment entered for the plaintiff in the action set aside, and judgment entered for them with costs, and that this appeal should be allowed. They will humbly advise His Majesty accordingly.

Having come to this conclusion, it is unnecessary for their

J. C.
1909
RUSSO-
CHINESE
BANK
v.
LI YAU SAM.

J. C. Lordships to deal with the question of the alleged misdirection of the Chief Justice in his summing up. They think it right, however, to say that, while he summarized the evidence with the greatest clearness and accuracy, and directed their attention to most of the material points, he appears to have failed to appreciate how inapplicable the doctrine of "holding out" is to a case in which the agent's authority is, to the knowledge of the person dealing with him, limited, and that by reason of this his observations to the jury at several portions of his charge amount practically to misdirections, by which they might possibly have been misled, though it is by no means clear that they did not in fact fully understand the nature of the questions left to them.

The respondent must pay the costs of the appeal.

Solicitors for appellants: *Stephenson, Harwood & Co.*

Solicitors for respondent: *Wadeson & Malleison.*

[PRIVY COUNCIL.]

J. C.* JAMES LESLIE WILLIAMS DEFENDANT;
 1909
 AND
 Dec. 9, 10. EDWARD O'KEEFE AND OTHERS PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

New South Wales Crown Lands Acts—Agreement by the Crown with Licensee of Land—Jurisdiction of Land Appeal Court.

An agreement by the Government that in consideration of a licensee of land paying licence fees as demanded (which had been refused because of a dispute as to a new appraisalment) a notification to the effect that the licences had not been renewed owing to non-payment thereof should be revoked and that the licensee should quietly enjoy his holding is not ultra vires the Crown as being contrary to the New South Wales Crown Lands Acts; and on breach thereof by the Government an action will lie.

Held, also, that the Land Appeal Court had no jurisdiction to

* *Present*: LORD LOREBURN L.C., LORD MACNAGHTEN, LORD COLLINS, and SIR ARTHUR WILSON.

determine the status of such land and to decide that the said land was not held by the licensee under the agreement, but was available for annual leases.

J. C.

1909

WILLIAMS

v.
O'KEEFE.

APPEAL by special leave from a judgment of the High Court (December 9, 1907) reversing a judgment of the Supreme Court of New South Wales (March 15, 1907).

In the years 1899—1901 one Andrew O'Keefe, the respondents' testator, was as transferee of the original licences entitled under the New South Wales Crown Lands Acts to an occupation licence of the leasehold area of the Barham pastoral holding. In the year 1900 the Minister for Lands, under the circumstances detailed in *O'Keefe v. Malone* (1), granted annual leases of parts of the said holding to one James Malone and his three sons. O'Keefe thereupon brought an action in the Supreme Court of New South Wales against James Malone for trespass, the ultimate judgment being that of the Privy Council in 1903. (1)

On December 15, 1905, the respondents as O'Keefe's legal personal representatives sued the appellant as nominal defendant on behalf of the State of New South Wales, and on March 28, 1906, filed their declaration, which contained two counts, one framed on an agreement for quiet enjoyment, the other on the common money counts, and concluded with a claim for 2000*l*.

The first count was summarized by Pring J. in the Supreme Court as follows: "The count is exceedingly prolix and embarrassing, but I think the substance of it may be stated as follows: It appears that Andrew O'Keefe was the holder of an occupation licence and of a preferential occupation licence on Barham pastoral holding. It was agreed between him and the Government that there should be a fresh appraisalment of the licence fees payable by him in respect of these licences, that he should bear the cost of this appraisalment, and that he should pay the fees for the year 1900 and the succeeding years at the new rates. The Government then in breach of this agreement (which is not the agreement sued on) demanded payment at the old rate before the new rate had been determined by appraisalment. This demand not having been complied with by O'Keefe, the Government published a notification in the

(1) [1903] A. C. 365.

J. C
1909
WILLIAMS
v.
O'KEEFE.
—

Gazette that the licences had not been renewed.' After that O'Keefe and the Government entered into the agreement sued on, which is thus stated in the count: 'And afterwards the Government and the said Andrew O'Keefe entered into a further agreement whereby it was agreed upon the part of the Government that in consideration of the said Andrew O'Keefe forthwith paying the amount so demanded as aforesaid' (that is the amount payable at the old rate) 'the notification in the Government *Gazette* should be revoked within a reasonable time after such payment and as from the date thereof and the said Andrew O'Keefe should be permitted subject to the provisions of the said Acts to quietly enjoy the resumed area and leasehold area during the year 1900 and any succeeding years in respect of which the occupation licence and the preferential occupation licence might be renewed free from interference disturbance or eviction on the part of the Government or any person or persons claiming under it by matter subsequent to the said payment and that the accounts in connection with the licence fees for the year 1900 should eventually be adjusted.' The count then proceeds to allege that O'Keefe paid the amounts and alleges breaches of the agreement, one of which is that the Government did not revoke the aforesaid notification in the Government *Gazette* within a reasonable time after such payment, or as from the date thereof, but granted annual leases of portions of the land to other persons."

The appellant by his fifth plea to the said declaration pleaded an order or judgment of the Land Appeal Court (in pursuance of which the said annual leases had been granted) by way of estoppel to so much of the respondents' cause of action as depended upon the breach secondly assigned by the first count of the declaration.

On March 15, 1907, the Supreme Court of New South Wales unanimously decided that the first count of the declaration was bad in substance because the agreement sued on was ultra vires the Crown, having been made by the Government contrary to the provisions of the Crown Lands Acts. Pring J. added that the said fifth plea was also bad on the ground that under the Crown Lands Acts neither the Local Land Board nor the

Land Appeal Court had power to determine whether land is open to annual lease or not: *O'Keefe v. Williams*. (1)

The High Court held that the declaration was good and the fifth plea bad. It considered that the special agreement declared on was valid and that there had been an admitted breach of it. They pointed out that the respondents' testator was (as held by the Privy Council) the lawful owner of the said lands during the subsistence of the licences which were still in force, and therefore the agreement was not a disposition of Crown land, but only a bargain relating to a subject's own interest in land; and, further, that by the agreement the Crown for valuable consideration merely bound itself to rectify its previous error and for the future to refrain from interfering with the respondents' testator in his lawful occupation of his own land. They held that the agreement was valid whether regarded as an exercise of the ordinary powers of the Executive or as a compromise of a bona fide claim or as a proceeding under the provisions of the Crown Lands Act, 1891, relating to the waiver of forfeiture. As regards the fifth plea the judges were of opinion that it was bad because the Crown Lands Act contained nothing which makes a proceeding in the Land Appeal Court binding between the Crown and its subjects. (2)

Levett, K.C., and *J. Austen-Cartmell*, for the appellant, contended that judgment should be entered for him and that it should be declared that the fifth plea was good in substance. The Crown is in a different position from a private owner. Its right to deal with Crown lands is not absolute, but is limited and defined by the provisions of the Crown Lands Acts and cannot be exceeded. The Crown is trustee of Crown lands with certain statutory powers. It had no power given to it to make the agreement sued upon. The agreement was bad in that it was an agreement to issue an occupation licence and a preferential occupation licence and did not allege compliance with s. 81 of the Crown Lands Act, 1884, and s. 4 of the Crown Lands Act,

J. C.

1909

WILLIAMS

v.
O'KEEFE.

(1) 7 New South Wales State Reports, 304. (2) 5 Commonwealth Reports, 217.

J. C. 1895. It was impossible to imply an agreement by the Crown
 1909 for quiet enjoyment in favour of an occupation licensee; and an
 ~~~~~ agreement to that effect cannot be held to guarantee a licensee  
 WILLIAMS against mistakes or errors in the construction of the Land Acts.  
 v. The licensee must satisfy himself that all statutory requirements  
 O'KEEFE. have been complied with. In this case the Land Appeal Court  
 ~~~~~ had decided that the land was available for annual leases. The  
 Minister acted in pursuance of its judgment, which he was by
 statute bound to obey, and the plea of estoppel was good. Refer-
 ence was made to the Crown Lands Acts of 1861; of 1884, ss. 4,
 5, 6, 11, 13, 14, 30, 31, 39, and 128; and of 1889, ss. 29 and 33;
 also to the Crown Lands Act Amendment Act, 1891, ss. 2 and 6,
 and to the Crown Lands Act, 1895, ss. 4 and 49.

H. Terrell, K.C., and *Alfred Adams*, for the respondents, were
 not heard.

1909
 ~~~~~  
 Dec. 10.

The judgment of their Lordships was delivered by  
 LORD LOREBURN L.C. It does not seem necessary to discuss  
 on the present appeal either the facts of the case or the pro-  
 visions of the various Acts to which Mr. Levett in his argument  
 directed attention. For this is merely a question of demurrer  
 both to declaration and plea. In the meantime, their Lordships  
 are informed, the case has been tried, and any genuine points  
 of law can be decided, if need be, on the facts as they are, and  
 not upon any imaginary picture of the facts which may  
 commend itself to the pleader.

The Supreme Court of New South Wales did not determine  
 the demurrers, but determined a question not raised in the  
 pleadings at all, namely, whether or not the State in granting  
 an occupation licence gives thereby a warranty of quiet enjoy-  
 ment. No doubt this was done with a desire to help the parties  
 to an end of their disputes, and proceeded upon an admission  
 of fact made by the plaintiff's counsel, namely, that he did not  
 rely upon any express but only upon an implied warranty of  
 title. Their Lordships have been asked to take the same course,  
 but it is undesirable for this Board to express any opinion upon  
 an abstract point of law without any knowledge of the actual  
 facts or any jurisdiction to determine.

When the case came before the High Court of Australia a decision was given upon the demurrers themselves with which their Lordships entirely agree. In regard to the declaration it is impossible to say as a matter of law that the Crown could not bind itself by an agreement such as that declared upon. If any party makes a contract for a good consideration to do something which he was already bound to do, though no one was at the time sure that the duty already existed, the other party can sue upon the contract. Inasmuch as their Lordships were told by the appellant's counsel that this alleged contract had no existence in fact it would be a waste of time to discuss the subject further. The demurrer to the plea is valid, because in point of law the Land Appeal Court had no jurisdiction to determine the status of the land which is the matter of this litigation, and therefore the estoppel pleaded does not arise. There might be other reasons, but one will suffice.

In these circumstances their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *Light & Fulton.*

Solicitors for respondents: *Bell, Brodrick & Gray*

J. C.

1909

WILLIAMS  
v.  
O'KEEFE.



## [PRIVY COUNCIL.]

J. C.\* KELLY . . . . . APPELLANT;  
 1909 . . . . . AND  
 Nov. 2; HART . . . . . RESPONDENT.  
 Dec. 2.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH  
 WALES.

*New South Wales Police Offences Act, 1901, s. 61—Construction—Sunday  
 Trading at Railway Refreshment Rooms—Actual or intending Passengers.*

The respondent, lessee of the refreshment rooms at a railway station at Sydney, traded on Sunday by selling cigarettes. Upon an information filed against him under s. 61 of the New South Wales Police Offences Act, 1901, it was contended that the Sunday trading clauses of that Act did not bind the Crown, that the Railway Commissioners were in the same position as the Crown, and that the respondent was acting in accordance with a lease granted by the Commissioners and was therefore protected:—

*Held* that, as the lease did not authorize the supply of refreshments to other than actual or intending passengers, the onus lay on the respondent to prove that the purchaser of the cigarettes in this case was an actual or intending passenger, and as he had failed to do so he ought to have been convicted.

*Quere* whether the Sunday trading clauses in the said Act are binding upon the Crown.

APPEAL by special leave from an order of the Supreme Court (June 5, 1908). The appeal came before that Court on a special case which raised the question whether the magistrate's dismissal of an information against the respondent should be upheld.

The information was laid under s. 61 of the New South Wales Police Offences Act, 1901 (No. 5 of 1901), under the circumstances stated in their Lordships' judgment.

Upon the hearing it was proved on behalf of the appellant and admitted by the respondent that cigarettes were on Sunday, March 29, 1908, sold at the said refreshment rooms to various persons by an employee and with the authority of the respondent. No evidence was adduced by the respondent shewing that the persons to whom the said sales were made were persons

\* *Present*: LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, LORD SHAW, and SIR ARTHUR WILSON.

arriving or departing by train or were at the station on business connected with railway travelling. The case proceeded throughout on the footing that the respondent claimed the right to sell cigarettes on Sunday at the said refreshment rooms to any member of the general public.

On the magistrate's dismissal of the information a special case was stated under s. 101 of the Justices Act, 1902 (No. 27), for the opinion of the Supreme Court.

There was no dispute as to fact, and the points of law were in effect as follows: 1. That the act in question was done under the lease from the said Railway Commissioners to the respondent. 2. That the Sunday trading clauses of the Police Offences Act, 1901, do not bind the Crown. 3. That the said Railway Commissioners are the Crown and the said clauses do not bind the Commissioners. 4. That if the Railway Commissioners being authorized to lease refreshment rooms authorize another person to do on the station what they themselves are authorized to do, they and he are not bound by the section under which the prosecution was laid. 5. That the Government Railways Act, 1901, impliedly repeals all the Sunday trading clauses of the Police Offences Act, 1901. 6. That on the grounds of general public policy the Sunday trading clauses were not intended to aim at people of the class who traded at refreshment rooms at railway stations.

The majority of the Supreme Court (Simpson J. dissenting) upheld the magistrate's decision.

*Sir R. Finlay, K.C.*, and *J. Austen-Cartmell*, for the appellant, contended that an offence under s. 61 of the Act of 1901 was duly proved. That section was and is binding on the Crown and all persons claiming thereunder. By ss. 4 and 14 of the Government Railways Act, 1901 (No. 6), the Government railways of New South Wales, including their stations, were vested in "the Railway Commissioners of New South Wales," and afterwards, by ss. 4 and 8 of the Railway Commissioners Appointment Act, 1906 (No. 7), were and are vested in "the Chief Commissioner for Railways and Tramways." By s. 21 of the Act of 1901 the said Commissioners were authorized to lease

J. C.  
1909  
KELLY  
v.  
HART.

J. C.  
1909  
KELLY  
v.  
HART.  
—

any refreshment room appurtenant thereto, and on August 1, 1906, they granted a lease to the respondent which only contemplated a supply of refreshments to passengers in pursuance of powers incidental to the carrying on of the railway. So far as the general public were concerned the lessee was within the general prohibition contained in s. 6 of the Act of 1901, and the onus was on him to prove that the particular sale which formed the subject of the information was an exception thereto; in other words, that he sold to a passenger: see Roscoe's Digest, 18th ed., vol. 1, p. 95. No evidence to that effect was given. Moreover, the statute bound the Crown, and the Railway Commissioners had no power to exempt the respondent from the obligation of the Act. Reference was made to the *Magdalen College Case* (1); Craie's Stat. Law, p. 321; *Ex parte Rogerson* (2); *Roberts v. Ahern*. (3)

*Avory, K.C.*, and *Bodkin*, for the respondent, contended that he acted as agent for and under the control or authority of the Railway Commissioners, who are a part of the Executive Government and in that respect represent the Crown, and the Police Offences Act does not bind the Crown. The sale complained of was made in pursuance of the terms of the respondent's lease and was authorized and required thereby, the lessors having full power to determine to whom and what refreshments should be sold at the station. Even if s. 61 of the Act of 1901 bound the Crown, it was impliedly repealed by the Act No. 6 of that year so far as concerns railway refreshment rooms carried on by the lessees of the Commissioners; and there was no evidence in this case that the purchaser was not a bona fide traveller, if that circumstance was material. Upon the question whether s. 61 of Act V. of 1901 bound the Crown reference was made to *Attorney-General v. Great Eastern Ry. Co.* (4); *Small v. Smith* (5); *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employes' Association* (6); *Langwill v. Leahy* (7); *Cooper v. Hawkins* (8);

(1) (1715) 11 Rep. 66 b.

(2) (1888) 9 N. S. W. L. R. 30.

(3) (1904) 1 Comm. L. R. 406.

(4) (1880) 5 App. Cas. 473.

(5) (1885) 10 App. Cas. 119.

(6) (1906) 4 Comm. L. R. 488.

(7) (1904) 4 N. S. W. State Rep.

717.

(8) [1904] 2 K. B. 164, and note

on p. 165.

*Hornsey Urban District Council v. Hennell* (1); *Reg. v. Justices of Kent.* (2)

*Sir R. Finlay, K.C., in reply.*

The judgment of their Lordships was delivered by

LORD COLLINS. The appellant in this case is a sub-inspector of police in the metropolitan police district of the State of New South Wales. The respondent was and is the lessee of the refreshment rooms at the new railway station at Sydney in that State. By s. 61 of the Police Offences Act, 1901, of New South Wales it is enacted as follows: "Whosoever trades or deals or keeps open any shop, store or other place for the purpose of trading or dealing on Sunday [with certain exceptions not material to the present question] shall be liable to a penalty not exceeding 3*l.*"

The information alleged that on Sunday, March 29, 1908, one Philip Hart did trade at the railway refreshment rooms, Sydney railway station, in the metropolitan police district in the State of New South Wales, by selling cigarettes. The defendant pleaded not guilty, and the magistrate, after hearing the parties and the evidence adduced by them, dismissed the information, but at the instance of the informant stated a special case, setting out the evidence for the opinion of the Supreme Court.

The main point made for the defendant was that the Sunday trading clauses of the Police Offences Act, 1901, do not bind the Crown, that the Railway Commissioners were in the same position as the Crown, and that the defendant in doing what he had done was acting in accordance with the terms of the lease from the Commissioners and was therefore protected.

It appeared, however, from the lease, a copy of which formed part of the case, that it was given subject to certain conditions annexed thereto, one of which was as follows: "12. The refreshment room shall be kept open at all times required by the Commissioners, and refreshments supplied on demand to all persons arriving or departing by train at any time during the day or night."

The lease, therefore, does not contemplate, or provide for, the

(1) [1902] 2 K. B. 78.

(2) (1889) 24 Q. B. D. 181, 185.

J. C.  
1909  
KELLY  
v.  
HART.  
1909  
Dec. 2.



J. C.  
1909  
KELLY  
v.  
HART.  
—

supply of refreshments to persons other than actual or intending passengers. The defendant, therefore, in admitting a *prima facie* breach of a general prohibition such as that of the Police Offences Act, 1901, must accept the onus of proving that he comes within an exception if he relies upon one to the general liability (see the cases collected in Roscoe's Digest, last edition, vol. 1, at p. 95). Here he failed to give any evidence to prove that the person to whom he sold the cigarettes was an actual or intending passenger. The judges who heard the case on appeal to the Supreme Court differed in opinion. Simpson J. was rather inclined to think that the statute which prevented trading on Sunday bound the Crown, but thought it unnecessary to decide that question in the special circumstances. Assuming that the Commissioners were entitled to open refreshment rooms on Sunday as a necessary adjunct to their railway station, he questioned whether it could be considered a necessary adjunct to their railway station if it was used for the purpose of supplying the general public. He thought that Hart, as the servant of the Commissioners, was authorized by them to sell refreshments, not to the general public, but to persons arriving or departing by train. He was therefore of opinion that the magistrate should have convicted, and that the case should be remitted to him with the expression of that opinion. Street and Sly JJ. agreed in all points with the contention of the defendant. Their Lordships agree with the view expressed by Simpson J., and, like him, they refrain from giving any opinion on the question whether or not the Sunday trading clauses of the Police Offences Act, 1901, are binding upon the Crown.

Their Lordships will therefore humbly advise His Majesty that the appeal be allowed, and that the case be remitted to the learned stipendiary magistrate to be dealt with in accordance with this opinion.

Each party will bear his own costs of this appeal.

Solicitors for appellant: *Light & Fulton.*

Solicitors for respondent: *Snow, Fox & Higginson.*

[PRIVY COUNCIL.]

ALEXANDER GILL . . . . .	PLAINTIFF;	J. C.*
AND		1909
F. T. B. WESTLAKE . . . . .	DEFENDANT.	Oct. 28, 29 ; Dec. 16.

ON APPEAL FROM THE HIGH COURT OF THE ISLE OF MAN  
(STAFF OF GOVERNMENT DIVISION).

*Isle of Man Appellate Jurisdiction Act, 1867, ss. 3, 5—Construction—Appellant's Claim for Retrial as a Matter of Right dismissed—Verdict such as might reasonably be found.*

The Isle of Man Appellate Jurisdiction Act, 1867, provides a new mode of procedure with respect to traverses or appeals from verdicts of common law juries which had been abolished by an Act in 1866, re-enacting the old procedure only up to the point of entering the traverse, but no further. Sect. 3 of the Act of 1867 according to its true construction empowers the Court to review proceedings at a trial with respect to questions both of law and fact (except as to the admission and rejection of evidence), to determine all questions of law, and upon questions of fact or damages, subject to certain limitations in its first proviso, to order a new trial or to order judgment to be entered for either party. Sect. 5 of the said Act forbids the consideration of any questions as to any determination, ruling, or direction of the judge at the trial in matter of law unless the points or questions objected or excepted to be stated in the form of a case in writing agreed to or settled by the judge and filed at least three days before the hearing of the traverse.

Where a jury of six found against the appellant on his suit for damages to his land caused by the defendant's excavations on his land, and the appellant appealed from this finding without complying with s. 5, demanding a retrial of his claim before a jury of twelve on the testimony given in the Court below without recalling the witnesses or admitting further evidence, or in the alternative for a new trial on the ground that the verdict was against the weight of evidence :—

*Held*, that no question of law was open to the appellant, that the claim for retrial as a matter of right could not be allowed, and that there was evidence on which the jury might reasonably find that the damage was caused by subsidence due to the defendant's drainage of his own land, and not by the defendant's withdrawal of lateral support.

APPEAL from an order of the above Court (July 1, 1907) dismissing with costs the appellant's traverse and appeal from the verdict of a special jury of six.

\* *Present* : LORD MACNAGHTEN, LORD ATKINSON, and LORD COLLINS.

J. C.  
1909  
GILL  
v.  
WESTLAKE.

On February 20, 1906, the appellant sued to recover damages from the respondent by reason of his having wrongfully withdrawn support to the plaintiff's land and houses. The jury found for the defendant that the damage was "caused by the abstraction of water."

The evidence had been mainly directed to one issue, namely, whether the injury to the appellant's property was caused by a lateral movement of the land resulting from the withdrawal of the support afforded by the land of the respondent, or whether the injury was the result of the drainage of the appellant's land (including the foundations of the appellant's houses) by the excavations on the respondent's land, such excavations having tapped the water lodged in the appellant's land which had hitherto afforded a support to the appellant's property, and the withdrawal of which caused the appellant's property to subside.

Upon the hearing of the traverse or appeal two questions were argued on behalf of the appellant, one being the question whether the verdict was unreasonable or against the weight of evidence, and the other whether the appellant by the law of the Isle of Man had an absolute and indefeasible right to have a retrial of the action by having the case submitted to a jury of twelve men.

*Danckwerts, K.C., E. Morten, K.C., Coote, and Hughes-Games*, for the appellant, contended that he was entitled as matter of right to have his case retried by a jury of twelve. That right was absolute and indefeasible under the old law of the island relating to traverses from common law juries and was recognized and continued by s. 2 of the Appellate Jurisdiction Act, 1867. From the earliest days the House of Keys was in the island the Court of Appeal from all verdicts of juries. There was an interval from 1777 to 1793 during which, under Manx Statutes 1777, c. 8, s. 3 (see Manx Statutes, vol. 1, p. 325), the appeal was to the House of Keys in all matters affecting land and to the Governor in all other matters. But in 1793 the appellate jurisdiction of the House of Keys in actions of all natures was restored—see Manx Statutes 1793, s. 1 (vol. 1, p. 341)—and the absolute right of a litigant to appeal was recognized in 1847: see Manx Statutes 1847, s. 2, vol. 2, p. 181. Then came the Act of 1867

(Manx Statutes, vol. 3, p. 425), which provided a new Court of Appeal to take the place of the House of Keys in appellate jurisdiction. This Court was by the Isle of Man Judicature Act, 1883, ss. 4 and 9 (Manx Statutes, vol. 5, pp. 223 and 225), merged in the High Court, its appellate jurisdiction being by s. 28 transferred to the Staff of Government Division. It was contended that the Act of 1867 did not repeal any of the former Acts nor take away the litigant's absolute right of appeal in matters of fact or damages. Reference was made to ss. 2 and 3 of the Act, and it was contended that on hearing the traverse the Court could only decide upon questions of law arising at the trial. Should any fact or any question as to the amount of damages be in dispute the Court was bound to order a new trial. The Act of 1866 (Manx Statutes, vol. 3, p. 372) had abolished appeals, but the Act of 1867 in restoring them continued (see s. 2) the previous practice, and did not provide an entirely new procedure and place the appellant's right to a new trial under the discretion of the new Appellate Court.

*Ring* (Attorney-General of the island), *Raymond Asquith*, and *Ramsay B. Moore*, for the respondent, were not heard.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from an order of the Staff of Government Division of the High Court of Justice of the Isle of Man, dismissing, with costs, the appellant's traverse or appeal from the verdict of a special jury of six on the trial of an action in which the appellant was plaintiff and the respondent defendant.

The action was brought in the Common Law Division of the High Court to recover compensation for injury alleged to have been caused to houses and land by the withdrawal of lateral support.

At the time of the alleged cause of action the plaintiff and the defendant were, as they still are, adjoining landowners in Little Switzerland, in the borough of Douglas. The land in question is on the side of a hill sloping towards the sea at an angle of about eighteen degrees. The plaintiff's property is uppermost. It is separated from the defendant's property by a public road, called

J. C.  
1909  
GILL  
v.  
WESTLAKE.  
—

1909  
Dec. 16.  
—



J. C.

1909

GILL

v.

WESTLAKE.

Little Switzerland Road. There are two semi-detached houses on it, which were built in the year 1891, and had not at the date of the action acquired the right to support from adjacent land.

In December, 1905, the defendant began to excavate the ground at the lowest part or seaward end of his land for the purpose of erecting buildings upon it.

The plaintiff's complaint was that the defendant's operations had caused his land to slide or move forward, with the result that the walls of his two houses were cracked and the level of the floors disturbed.

It was not disputed that the plaintiff's houses were injured in consequence of the defendant's operations; but the defendant's case at the trial was that he had done no more than drain his own land. The drainage had no doubt withdrawn subterranean water from the land of the plaintiff, and there was some evidence to shew that the injury complained of was caused by subsidence and not by any sliding or forward movement of the ground.

The trial lasted eleven days. The evidence was conflicting. The learned Deemster who tried the case seems to have summed up very fully and very fairly. With the assent of the learned counsel on both sides, he took as a guide the proposition of law laid down in the case of *Popplewell v. Hodkinson* (1), and he told the jury that, if the contention of the defendant was correct, and if there was no lateral movement, but only a downward movement resulting from abstraction of subterranean water, the verdict on that part of the case must be for the defendant.

The jury found for the defendant on the plaintiff's claim. There was a counter-claim, on which the jury found for the plaintiff. From that part of the verdict there was no appeal. But the plaintiff appealed from the finding in favour of the defendant.

Two points were made by the plaintiff. In the first place he demanded as a matter of right under the Appellate Jurisdiction Act, 1867, a retrial of his claim before a jury of twelve on the testimony given in the Court below without recalling the witnesses or admitting further evidence. He also contended that, if the Court should be against him on the first point,

(1) (1869) L. R. 4 Ex. 248.

he was entitled to a new trial on the ground that the verdict was against the weight of evidence.

The Court rejected the appeal. Separate judgments were given on the two points in debate. On the first the Court held that it was enough to say that the claim for a retrial, as a matter of right, was contrary to established practice, though no case was forthcoming in which the language of the Act had been discussed or reasons given for the interpretation placed upon it.

On the second point the Court held that the verdict could not be disturbed. The credit to be given to the evidence on behalf of the defendant was for the jury, and, though the judges in the Court of Appeal might not have come to the same conclusion, it appeared to them that there was sufficient evidence on which six honest men could come to the conclusion that the damage was caused by subsidence due to the abstraction of water.

On the appeal before this Board the first point was urged with great force and ability by the learned counsel for the appellant, who referred to all the statutes bearing on the question and said that, as the principal Act apparently had never been construed in any Court in the island, it was desirable that their Lordships should determine its true construction.

At the conclusion of the appellant's argument on the first point their Lordships intimated that they saw no reason to differ from the Court of Appeal. The second point was then opened but not pressed. Mr. Danckwerts said very properly that, as the evidence was undoubtedly conflicting, he could not hope to succeed if their Lordships thought right to apply the rule laid down in such cases by the highest Courts in this country.

From the earliest days, as long as the House of Keys exercised both judicial and legislative functions, it was the Court of Appeal from all verdicts of juries except during the period between 1777 and 1793, during which an appeal lay to the Governor in all matters other than those affecting land.

In 1793 the appellate jurisdiction of the House of Keys was restored in actions of all kinds. The procedure as to entering traverses or appeals for hearing by the House of Keys and the practice in regard to giving security for the amount of the verdict

J. C.

1909

GILL

v.

WESTLAKE.

J. C.

1909

GILL

P.

WESTLAKE.

and costs were afterwards regulated by an Act promulgated in 1847 and an amending Act promulgated in 1850.

On the traverse or appeal being duly entered, the case came before the House of Keys upon the signed depositions of witnesses taken at the trial.

In 1866 the House of Keys ceased to exercise judicial functions. By an Act passed in that year it was enacted that the appellate jurisdiction of the House of Keys in all matters triable by jury in the Court of Common Law and in all other matters of appeal or traverse to the House of Keys should cease and determine.

From the passing of that Act until the Appellate Jurisdiction Act, 1867, there seems to have been no provision for appeals.

By s. 2 of the Act of 1867 provision was made that any person aggrieved by a verdict might, within the time theretofore limited by law for entering traverses, enter a traverse in the Rolls Office, and it was enacted that all provisions contained in the Act of 1847 and the Act of 1850 with respect to traverses or appeals to the House of Keys should be read as applicable to traverses to be entered under the Act of 1867, whether such traverses should be from verdicts in the Court of Common Law or not, and that no traverse should lie otherwise than under the Act from a verdict in any Court which theretofore could have been traversed to the House of Keys.

Sect. 3 of the Act of 1867, so far as material, is in the following words:—

“3. Every traverse entered under the provisions of this Act shall be heard by the Court on the petition of either party in the cause or suit, and on the hearing thereof the Court may [except as to the admission or rejection of evidence] review the proceedings at the trial, and determine all matters of law which may have arisen thereat, including any determination or ruling of the judge who presided at the trial, and the directions given to, or the questions submitted by the judge for the consideration of the jury; and such determination of the Court shall, subject to the right of appeal as hereinafter mentioned [that is, to His Majesty in Council] be final and conclusive; and should any question of fact or any question as to amount of damages then remain between the parties, the Court shall, upon the application

of the traverser, order a new trial, and such new trial shall be had upon the evidence adduced at the former trial without recalling the witnesses; or may order judgment to be entered for either party as the case may be."

Then follow a provision as to costs and a provision for summoning a jury of twelve and a direction that nothing therein contained should empower the Court without a new trial or consent of parties to alter a verdict as to the amount of damages or as to the finding of the jury on matters of fact only.

On behalf of the appellant it was argued that, upon hearing the traverse, the Court could only decide upon questions of law arising at the trial, and that, should any fact or any question as to the amount of damages be in dispute, the Court was bound to order a new trial, to be had upon the evidence adduced on the former trial without recalling the witnesses before a jury of twelve.

Their Lordships are unable to accept this view. They are of opinion that the old law with respect to traverses from verdicts of common law juries was abolished by the Act of 1866, and that the Act of 1867 provided a new mode of procedure, preserving only by re-enactment the old procedure up to the point of entering the traverse, but no further. They are of opinion that, according to the proper construction of s. 3, the Court is entitled to review the proceedings at the trial, both with respect to questions of law and questions of fact, except as to the admission or rejection of evidence, and to determine all questions of law, and that, as to questions of fact or questions of damages, subject to the limitations in the first proviso of s. 3, a judicial discretion was given to the Court either to order a new trial or to order judgment to be entered for either party.

No question of law was open to the appellant on his appeal to the Court of Appeal, as he had not complied with the provisions of s. 5 of the Act of 1867, which forbids the consideration of any questions as to any determination, ruling, or direction of the judge at the trial in matter of law, unless the points or questions objected or excepted to be stated in the form of a case in writing agreed to or settled by the judge and filed at least three days before the hearing of the traverse.

J. C.

1909

GILL

v.

WESTLAKE.



J. C.  
1909  
GILL  
?  
WESTLAKE.

In the result their Lordships are of opinion that the decision of the Court of Appeal on both points was perfectly right and that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The appellants must pay the costs of the appeal.

Solicitors for appellants: *Tarry, Sherlock & King.*

Solicitors for respondents: *J. H. & K. R. Cobb.*

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[PRIVY COUNCIL.]

J. C.* 1909 Oct. 27.	CHINA NAVIGATION COMPANY, LIMITED . DEFENDANTS ;  AND ASIATIC PETROLEUM COMPANY, LIMITED, AND THE TAKU TUG AND LIGHTERAGE COMPANY, LIMITED . . . . .	} PLAINTIFFS.
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THE TIENTSIN.

ON APPEAL FROM THE SUPREME COURT FOR CHINA AND  
COREA AT SHANGHAI.

*Collision Regulations, art. 29—Signal as to Alteration of Course—No Duty to stop if Signal unanswered.*

Where the appellants' steamship came into collision with the respondents' lighter in a narrow channel under circumstances which rendered the respondents' tug clearly to blame:—

*Held*, that the judge was in error in holding the appellants' steamship also to blame because she did not stop her engines on the tug's failure to answer her signal to the effect that she had altered her course to the starboard. The tug seemed to be acting in accordance with the rule of the road, and the captain of the appellants' steamship in proceeding on his course cautiously at half speed did not fail in his duty in any respect.

APPEAL from a judgment of the Supreme Court (October 10, 1908) finding the *Tientsin* and the tug both to blame for a

\* *Present*: LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and LORD GORELL. *Nautical Assessors*: ADMIRAL SIR ARCHIBALD L. DOUGLAS, G.C.V.O., K.C.B., and COMMANDER W. F. CABORNE, C.B., R.N.R.

collision which occurred in the north reach of the river Haiho under circumstances which are detailed in the judgment of their Lordships.

The Court, in holding the tug to blame, found that she was wrong (a) in expecting the *Tientsin* to pass starboard to starboard as a matter of course, and (b) because she did not bring her intention to break art. 25 of the regulations for preventing collisions at sea and to pass on her wrong side to the notice of the *Tientsin* at the earliest possible moment; (c) in waiting passively until the *Tientsin* opened her green light without signalling. The judgment, in holding the *Tientsin* also to blame, found that she neglected to comply with art. 29 of the collision regulations because she did not stop her engines on the tug's failure to answer her one-blast signal and because the *Tientsin* did not use every effort to get clear over to the starboard side of the channel, even at the risk of "grounding on the shelving bank."

The collision regulations material to the case are—

Art. 25. "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

Art. 27. "In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances that may render a departure from the above rules necessary in order to avoid immediate danger."

Art. 29. "Nothing in these rules shall exonerate any vessel or the owner, or master, or crew thereof, from the consequence of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

*Butler Aspinall, K.C.*, and *A. D. Bateson*, for the appellants, contended that the *Tientsin* was not to blame. Her engines were reduced to half speed directly an indication of the tug was seen, and as soon as the tug and lighter's red lights came into sight the *Tientsin* blew one short blast on her whistle to indicate that she was altering her course to starboard, i.e., more into the

J. C.

1909

CHINA

NAVIGATION  
COMPANY,  
LIMITED

v.

ASIATIC  
PETROLEUM  
COMPANY,  
LIMITED,  
AND THE  
TAKU TUGAND  
LIGHTERAGE  
COMPANY,  
LIMITED.

J. C.      *Tientsin's* own side of the river. The tug did not at once reply,  
 1909      but kept her red light open, and as the position was thus  
 ~~~~~  
 CHINA perfectly safe, the *Tientsin* proceeded on until, suddenly and
 NAVIGATION without any previous warning, first the lighter and then the tug
 COMPANY, opened their green lights (the latter giving two short blasts as
 LIMITED she did so), whereupon the *Tientsin* gave another short blast
 " and immediately reversed her engines full speed and gave three
 ASIATIC short blasts on her whistle. The tug at once altered her course
 PETROLEUM again, shewed her red light, and then towed the *Scot* across the
 COMPANY, bows of the *Tientsin*, with the result that the *Scot* was struck
 LIMITED, amidships on the port side and had to be beached to avoid sink-
 AND THE ing in deep water. It was contended that the *Tientsin* complied
 TAKU TUG with the regulations and the tug did not.
 AND
 LIGHTERAGE

Schiller, for the respondents, contended that the tug and lighter did not commit any breach of the regulations, but were right in steering their course along the west bank of the river. The *Tientsin*, on the other hand, was negligent in not answering the first of the tug's signals. It thereby led the captain of the tug to believe that the steamship was going to pass on the starboard side. She was also negligent in not stopping her engines and going astern when she sighted the lighter and in not going further over to starboard.

Counsel for the appellants were not heard in reply.

J. C. The judgment of their Lordships was delivered by
 1909 LORD MACNAGHTEN. This is an appeal from the Supreme
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 Oct. 27.      Court for China and Corea at Shanghai in a collision case.

The collision took place about 7 P.M. on March 15, 1907, between the steamship *Tientsin* and the *Scot*, a lighter in tow of the tug *Hsinho*, in the north reach of the river Haiho.

The *Tientsin* was going down the river on an ebb tide of 1 to 1½ knots. The weather was fine and clear, the wind north. The tug and tow were coming up. When rounding the bend between the New City reach and the north reach on a port helm, those on board the *Tientsin* observed the two masthead lights, and shortly afterwards the red light, of the tug and the red light of the tow about half a mile off on the west or right-hand side of the stream, heading at a slight angle towards the other side,

which was the proper side for vessels coming up the river to take. As soon as the tug was observed the *Tientsin's* engines were put at half speed, and when the red light of the *Scot* came into sight the *Tientsin* blew one short blast on her whistle to indicate that she was altering her course to the starboard. The tug did not give an answering signal, but she kept her red light open, when suddenly first the *Scot* and then the tug opened their green lights, and the tug gave two short blasts. The *Tientsin* gave another short blast, reversed her engines full speed, and gave three short blasts on her whistle. The tug altered her course again, shewing her red light, and tugging the *Scot* across the bows of the *Tientsin*. The *Tientsin* escaped the tug, but ran into the *Scot*, injuring her so severely that she had to be beached, and the cargo of oil which she was carrying was lost.

In their Lordships' opinion the tug was solely to blame for this collision, and the *Tientsin* was not in fault. The assessors concur in this opinion.

The acting judge who tried the case found the tug to blame, but he also found the *Tientsin* to blame, and that on two grounds. In the first place he thought the *Tientsin* ought to have stopped altogether when she got no answering signal from the tug. Their Lordships do not concur in this view. Though no answer was given, the tug seemed to be acting in accordance with the rule of the road, and the *Tientsin* was quite justified in proceeding on her course, moving cautiously at half speed as she did. As long as the tug and tow shewed their red lights and the vessels were port to port there was no reason to apprehend danger. Then the learned judge thinks that the *Tientsin* ought to have made every effort to get clear over to the starboard side of the channel, "even at the risk of grounding on the shelving bank." He relied apparently on an answer given by the second mate to the effect that "they might have gone further to starboard." The second mate, however, was not in charge of the vessel. It is not quite clear what was meant by this answer, or what was the moment of time with reference to which the second mate was speaking. The point does not seem to have been made at the trial, and no question bearing upon it was put to

J. C.  
1909  
CHINA  
NAVIGATION  
COMPANY,  
LIMITED  
v.  
ASIATIC  
PETROLEUM  
COMPANY,  
LIMITED,  
AND THE  
TAKU TUG  
AND  
LIGHTERAGE  
COMPANY,  
LIMITED.  
—



J. C.  
1909  
CHINA  
NAVIGATION  
COMPANY,  
LIMITED  
v.  
ASIATIC  
PETROLEUM  
COMPANY,  
LIMITED,  
AND THE  
TAKU TUG  
AND  
LIGHTERAGE  
COMPANY,  
LIMITED.

the captain who was in charge of the vessel. It does not appear to their Lordships that the captain of the *Tientsin* failed in his duty in any respect, or that under the circumstances he could have done more to avoid collision than he did.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed and the action dismissed with costs, including in such costs any costs of the reference directed by the order of October 10, 1908 (the costs up to October 5, 1908, to be paid by the respondent Asiatic Petroleum Company, and the subsequent costs by both the respondents), and that any costs paid by the appellants should be refunded.

The respondents will pay the costs of the appeal.

Solicitors for appellants : *Waltons & Co.*

Solicitors for respondents : *Indermaur & Brown.*

[PRIVY COUNCIL.]

J. C.\*  
1909  
*July 21, 22 ;*  
*Oct. 28.*

THE ST. JOHN PILOT COMMISSIONERS  
AND THE ATTORNEY-GENERAL FOR  
THE DOMINION OF CANADA . . . . .

} APPELLANTS ;

AND

THE CUMBERLAND RAILWAY AND COAL  
COMPANY . . . . .

} PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

*Pilotage Dues—Revised Statutes of Canada, 1886, c. 80, s 2(b) ; ss. 58 and 59—Construction.*

The respondents' vessels (about 440 tons each), built for the purpose of carrying coal, and carrying sails so as to be able to run before the wind, but not so as to be safely navigated in the ordinary way as sailing vessels, were towed by a steam tug in and out of the port of St. John.

In an action by the respondents to recover pilotage dues paid under the Pilotage Act (Revised Statutes of Canada, 1886, c. 80), ss. 58 and 59 :—

*Held*, that s. 58 applied to the said vessels as ships which navigate

\* *Present* : LORD LOREBURN L.C., LORD ASHBOURNE, LORD COLLINS, LORD GORELL, and SIR ARTHUR WILSON.

within the district of St. John, i.e., perform voyages into or out of the port of St. John; ships being defined by s. 2 (b) as including "every description of vessel used in navigation not propelled by oars," and s. 58 not indicating that in the pilotage waters a ship must at the time possess independent practical power of moving herself.

*Held*, also, that they were not exempted under s. 59 (c), since they were not ships propelled wholly or in part by steam, the word "propelled" not including traction within its scope.

APPEAL by special leave from a judgment of the Supreme Court (December 26, 1906) affirming a judgment of the Supreme Court of New Brunswick (February 10, 1906), which by a majority (Tuck C.J. dissenting) had refused an application by the defendants to set aside a verdict for the plaintiffs and enter a verdict for the defendants given by McLeod J. (October 9, 1905) at the trial.

The action was brought to recover the amount of pilotage dues which the respondents were compelled to pay to the commissioners between April 24, 1893, and May 4, 1903, in respect of coal barges belonging to the respondents tugged by a steam tug within the pilotage district of St. John between those dates. The declaration dated September 18, 1903, consisted of money counts. The appellants pleaded "never indebted" and the Statute of Limitations. They further gave "notice of set-off," under which they claimed to recover from the respondents the sum of \$735 for pilotage dues alleged to be payable between May 14, 1903, and the commencement of the action. It was proved in the course of the trial that the pilotage dues paid by the respondents between April 24, 1893, and May 4, 1903, amounted to \$15,680.08. Of this amount \$7487.58 was paid more than six years before the commencement of the action. McLeod J. held that the right to recover the last-mentioned sum was barred by the statute and found the balance of \$8192.50 to be due to the respondents.

The question decided in this appeal was whether the respondents' barges were liable to pilotage dues under the provisions of the Pilotage Act (Revised Statutes of Canada, 1886, c. 80), ss. 58 and 59, set out in their Lordships' judgment, the provisions of which sections have with one or two immaterial verbal alterations been re-enacted in the Canada Shipping Act, 1906, c. 113, ss. 475 and 477.

J. C.  
1909  
ST. JOHN  
PILOT  
COMMISSIONERS  
?  
CUMBER-  
LAND  
RAILWAY  
AND COAL  
COMPANY.  
—

McLeod J. held, under the circumstances stated in their Lordships' judgment, that the vessels, being moved by steam tugs, were exempt from pilotage dues as vessels propelled by steam.

The Supreme Court of New Brunswick refused to disturb the verdict, being of opinion that a reasonable construction of the word "propel" used in connection with the term "navigation of ships" is that it refers to the power which carries them on their voyage and secures their efficient navigation, and is not limited to the meaning "shove" or "push forward." Tuck C.J. held that in order to bring a vessel within the exemption provided by s. 59 the propelling power must be within the vessel itself.

Before the Supreme Court of Canada the further point was raised, "Did the schooners or so-called barges navigate within the pilot district of St. John?" It was unanimously held that the barges in question were not "navigated" within the meaning of the word in s. 58 of the Pilotage Act, inasmuch as they were not ships having independent practical moving or sailing powers which a pilot could direct and control, and that if they were ships being "navigated" within the meaning of that word in s. 58, they clearly came within the exemption provided by s. 59 for the case of "ships propelled wholly or in part by steam employed in trading."

*Newcombe, K.C.*, and *A. D. Bateson*, for the appellants, contended that a verdict should be entered for the defendants. The vessels are ships within the terms of ss. 2 and 58 of the Pilotage Act, and were registered under the Merchant Shipping Act. They were propelled by the wind or not at all, being built as schooners, and were not propelled wholly or in part by steam. Though towed in and out of port they were none the less navigated within the meaning of s. 58. They were of greater tonnage than vessels exempted by s. 59, and did not fall within any of the exemptions contained in that section. Reference was made to the Revised Statutes of Canada, c. 72, ss. 4, 5; Merchant Shipping Act, 1894, s. 743; and *The Grandee*. (1)

*Maclean, K.C.*, and *Tyrrell T. Paine*, for the respondents,

(1) (1902) 8 Can. Ex. Rep. 54, 79.

contended that it was proved that the barges had no independent practical moving or sailing power which a pilot could direct or control. Consequently they were not ships which navigate within the meaning of s. 58, and were not chargeable thereunder with pilotage dues. They were also within the exemption of s. 59 as "ships propelled wholly or in part by steam." It was unnecessary, in the right view of the section, that the propelling steam power should be within the barges themselves, otherwise the tug and the tow should be deemed one vessel. Reference was made to *The Mac* (1) and *The Aracan*. (2)

*A. D. Bateson* replied, citing *Elmore v. Hunter*. (3)

The judgment of their Lordships was delivered by

LORD GORELL. The question for determination on this appeal is whether certain vessels belonging to the respondents were, when entering and leaving the port of St. John, New Brunswick, liable to pilotage dues under the provisions of the Pilotage Act (Revised Statutes of Canada, 1886, c. 80), ss. 58 and 59.

Those sections are as follows :—

"58. Every ship which navigates within either of the pilotage districts of Quebec, Montreal, Halifax or St. John, or within any pilotage district within the limits of which the payment of pilotage dues is, for the time being, made compulsory by Order in Council under this Act, shall pay pilotage dues, unless either—

"(a) Such ship is on her inward voyage, and no licensed pilot offers his services as a pilot, or

"(b) She is exempted under the provisions of this Act from payment of such dues.

"2. If such ship is on her outward voyage and the owner or master of such ship does not employ a pilot or give his ship into the charge of a pilot, such dues shall be paid, if in the pilotage district of Quebec, to the corporation of pilots for and below the harbour of Quebec, and if in any other pilotage district, to the pilotage authority of such district (36 Vict. c. 54, s. 57, part).

"59. The following ships, called in this Act exempted ships,

(1) (1882) 7 P. D. 38 and 126.

(2) (1874) L. R. 6 P. C. 127.

(3) (1877) 3 C. P. D. 116.

J. C.

1909

ST. JOHN  
PILOT  
COMMISSIONERS  
v.  
CUMBERLAND  
RAILWAY  
AND COAL  
COMPANY.

1909

Oct. 28.



J. C.  
1909  
ST. JOHN  
PILOT  
COMMISSIONERS  
?  
CUMBER-  
LAND  
RAILWAY  
AND COAL  
COMPANY.  
—

shall be exempted from the compulsory payment of pilotage dues:—

“(a) Ships belonging to Her Majesty;

“(b) Ships wholly employed in Her Majesty’s service, while so employed, the masters of which have been appointed by Her Majesty’s Government, either in the United Kingdom or in Canada;

“(c) Ships propelled wholly or in part by steam employed in trading from port to port in the same province, or between any one or more of the provinces of Quebec, New Brunswick, Nova Scotia, or Prince Edward Island and any other or others of them, or employed on voyages between any port or ports in the said provinces or any of them and the port of New York, or any port of the United States of America on the Atlantic, north of New York; except only in the ports of Halifax, Sydney pilotage district, Miramichi and Pictou,—as respects each of which ports the pilotage authorities of the district may, from time to time, determine, with the approval of the Governor in Council, whether any, and which, if any, of the steamships so employed shall or shall not be wholly or partially, and, if partially, to what extent and under what circumstances, exempt from the compulsory payment of pilotage dues;

“(d) Ships of not more than eighty tons, registered tonnage;

“(e) Any ship of which the master or any mate has a certificate granted under the provisions of this Act and then in force, authorizing him to pilot such ship within the limits within which she is then navigating;

“(f) Ships of such description and size, not exceeding two hundred and fifty tons, registered tonnage, as the pilotage authority of the district, with the approval of the Governor in Council, from time to time, determines to be exempt from the compulsory payment of pilotage in such district; Provided always, that this paragraph shall not apply to the river St. Lawrence, where all ships registered in Canada, if not more than two hundred and fifty tons registered tonnage, shall be exempt (36 Vict. c. 54, s. 57, part; 38 Vict. c. 28, s. 1; 40 Vict. c. 20, s. 3).”

By s. 2 (b) of the Act the expression “ship” includes

“every description of vessel used in navigation, not propelled by oars.”

In or about the year 1893 the respondents had built for them five vessels for the purpose of carrying coal sent from the respondents' mines at Spring Hill and shipped from Parrsboro, Nova Scotia, to the port of St. John and other ports along the east coast of Canada and the United States of America.

The vessels were each of about 440 tons, and were described as “schooners” in the builders' statements and claims for drawback, and the certificates of registry in Nova Scotia certified that they had within themselves the power of independent navigation, though the facts shew that this statement cannot be treated as being sufficiently explicit. They were constructed with two short masts, which were fitted as derricks, with gaffs for discharging cargo, and carried small triangular sails and a jib. These sails were used to steady the vessels and assist them in strong breezes. The vessels could run before the wind, but could not be safely navigated as sailing vessels in the ordinary way, and were intended to be, and in fact were, towed from port to port. Each had a captain and crew, and was fitted with steering gear and anchors. If they had been fully rigged they would have been navigable by sails as ordinary schooners.

The barges or schooners, whichever they are called, were towed by a steam tug from Parrsboro to St. John, and also on the return voyage. In summer there might be two or three in a line, but in winter only one at a time appears to have been towed.

The appellant commissioners are the pilotage authority for the pilotage district of St. John and entitled to collect the pilotage dues. The payment of these dues is made compulsory in the cases specified in the Act, but it is not compulsory upon an owner or master of a ship to employ, or give his ship into the charge of, a pilot, either on the ground of his being compelled to pay pilotage dues to any person or otherwise. (See s. 57 of the Act.)

From 1893 to 1903 the respondents' said vessels were engaged in carrying coal to St. John in the way above referred to, and a dispute existed between the commissioners and the respondents

J. C.

1909

ST. JOHN  
PILOT  
COMMISSIONERS  
v.  
CUMBER-  
LAND  
RAILWAY  
AND COAL  
COMPANY.

J. C.  
1909  
ST. JOHN  
PILOT  
COMMISSIONERS  
v.  
CUMBER-  
LAND  
RAILWAY  
AND COAL  
COMPANY.

as to whether the vessels were liable to pilotage dues. During this period it appears that the respondents, while refusing to take pilots on their vessels, were compelled to pay pilotage dues in order to obtain the clearance of the vessels, and, in fact, paid the dues under protest. The amount thus paid between April 24, 1893, and May 4, 1903, was \$15,680.08, of which \$7487.58 were paid more than six years before the commencement of the present suit, and \$8192.50 between September, 1897, and May, 1903, that is to say, within six years before the commencement of this suit. In consequence of a decision in the case of *The Grandee* (1), hereafter referred to, pilotage dues were not paid in respect of the said vessels after May, 1903, but, if payable, the amount thereof in and from May, 1903, to the time of the action was \$735.

In September, 1903, the respondents brought this suit against the commissioners to recover the pilotage dues paid as aforesaid. They sued on the common counts. The defendants pleaded "never indebted" and the Statute of Limitations, and also claimed the said sum of \$735.

The trial took place before McLeod J., and on October 9, 1905, he found in favour of the respondents that the vessels were not liable to the pilotage dues, and he directed a verdict to be entered for the plaintiffs for the sum of \$8192.50. He held that the rest of the plaintiffs' claim was barred by the Statute of Limitations, and he gave leave to the defendants to move to enter a verdict on their behalf for the \$735. The ground of the decision was that, in the opinion of the learned judge, following the case of *The Grandee* (1), the vessels came within the exemption of s. 59 (c) of the Act of 1886 as ships propelled by steam.

The defendants moved the Supreme Court of New Brunswick to set aside the verdict and enter a verdict for the defendants, or for a new trial. The motion was heard before Tuck C.J. and Barker, Hanington, and McLeod JJ., and was on February 10, 1906, refused, the Chief Justice dissenting. He expressed himself as differing entirely from the conclusion that where a ship is being towed and has no steam propelling power within

(1) 8 Can. Ex. Rep. 54, 79.

herself, she is propelled wholly or in part by steam within the meaning of the Act. The other judges concurred with the judgment below.

An appeal was then taken to the Supreme Court of Canada and heard before the Chief Justice and Davies, Idington, MacLennan, and Duff JJ. On December 26, 1906, the judgment of the Court was given by Davies J., dismissing the appeal on the ground that the vessels either were not vessels "which navigate" within s. 58, as they had not practically the power of independent motion, or were "ships propelled by steam" within s. 59. It is to be noticed that the view of the Court upon the first alternative was not that entertained in the Court of New Brunswick.

Before considering the language of the statute it may be desirable to refer to the case of *The Grandee* (1). The *Grandee* was a coal barge of about 1000 tons register, employed in carrying coal from Sydney, Nova Scotia, to Quebec. She had no motive power of her own, either by sails or steam, and was towed by a steam collier. She was held exempt from pilotage dues in the pilotage district of Quebec. There does not seem to be any substantial difference between that case and the present, for although in that case it seems to have been stated that the vessel had no motive power of her own, the vessels in the present case had, for practical purposes, no motive power of their own which would enable them to make their voyages in safety. The case was heard before Routhier J., the local admiralty judge for Quebec, who gave three reasons for his opinion: First, that a pilot was practically useless on such a vessel. This reason is to be found in some of the judgments in the present case, but it would, if correct, seem to apply equally to any vessel, though fully rigged, which was under the necessity of being towed into port. Second, that the tug (which is exempt) and tow are one vessel. This, however, cannot be correct, though for some purposes, e.g., steering and sailing rules, they may to some extent be so regarded. Third, that the vessel was only an accessory or "changement"—an object transported or dragged, as a carriage by a horse—and was not, properly speaking, a ship. This reason

J. C.

1909

ST. JOHN  
PILOT  
COMMISSIONERS  
".  
CUMBER-  
LAND  
RAILWAY  
AND COAL  
COMPANY.

(1) 8 Can. Ex. Rep 54, 79.



J. C.  
1909  
ST. JOHN  
PILOT  
COMMISSIONERS  
r.  
CUMBERLAND  
RAILWAY  
AND COAL  
COMPANY  
—

does not give effect to the term "ship" as used in the Act, and, indeed, the judgment is based on what may be termed practical reasons, and not upon sufficient consideration of the language of the Act. On appeal to the Exchequer Court of Canada, Burbidge J. affirmed the decision on grounds which are substantially the same as those given by Davies J. in the present case.

It may be observed that the statutes have been revised and re-enacted with some modifications in 1906. The statute of that year, c. 1, s. 21, sub-s. 4, provides that "Parliament shall not, by re-enacting any Act or enactment, or by revising, consolidating, or amending the same, be deemed to have adopted the construction which has, by judicial decision or otherwise, been placed upon the language used in such Act, or upon similar language."

The legislation on the subject of pilotage in Canada extends back for many years. The Pilotage Act of 1873 repealed a number of old statutes, in none of which, so far as their Lordships can trace, is there any enactment which would shew any distinction between barges or schooners of the kind and size of those in question used for the purpose of sea-going voyages, and towed in or out of port, and any vessel of the ordinary sailing powers similarly towed. There is a provision in 12 Vict. c. 117, s. 23, which in one case gives a lower rate of pilotage for vessels towed, for under it a Montreal pilot only had half rates when a vessel was towed by a steamer, but the general Act of 1873 does not appear to contain any similar provision. The Act of 1873 was revised in 1886, and some important changes were made by s. 59 of the revised statute with regard to the exemptions which were specified in s. 57 of the Act of 1873. There would seem to be no reason for placing different constructions upon the words "ships propelled wholly or in part by steam" used in these two sections. In the earlier it may be noticed that these words are used in relation to vessels proceeding on certain lengthy sea voyages upon which, in 1873, vessels without any motive power of their own would probably not be used. In the later section it may be further noticed that the word "steamships" is expressly used in the latter part of sub-s. (c).

The statutory provisions in question appear to have originated

in times when vessels were either sailing vessels or steamships or river craft, and before barges of such a size as the respondents' vessels were used for sea-going purposes. Exemptions from pilotage of vessels of small size are to be found in the Acts. It would seem from the letter of January 19, 1903, from the pilotage authority of St. John to the Deputy Minister of Marine and Fisheries, Ottawa, that these large barges, or schooners, were a new development, and it is probable that the explanation may be thus found of the fact that no special provision in the Acts is to be found dealing with cases of towage of such vessels. There is nothing in the evidence which would justify an assumption that the Legislature, in framing the Acts, had in view the relief of a class of large barges moved by towage alone from pilotage dues, and the question is whether the statute uses language which does or does not do so.

Before turning to the actual words of the statute it may be useful to refer to the other Shipping Acts of 1886, Nos. 72 to 80, in which "ship" is defined in a manner substantially the same as that above stated, and "steamship or steamer" is in c. 73, s. 1 (d), defined as including "any ship propelled wholly or in part by steam or other motive power than sails or oars." Steamboat is defined in c. 78, s. 2 (a), as including "any vessel used in navigation or afloat on navigable water and propelled or moveable wholly or in part by steam," and in c. 79, s. 1 (c), the expression "steamship or steamboat" includes "every vessel propelled wholly or in part by steam or by any machinery or power other than sails or oars." Sect. 2 of this Act also provides in arts. 4 and 6 as to the lights to be carried by vessels towing and being towed. In these definitions the word "propelled" is used with reference to the motive power possessed by the vessel, but the attention of the Courts below does not appear to have been called to this.

The first question is whether the 58th section imposes the compulsion upon these barges unless they are exempted by s. 59. It applies to "every ship which navigates within" certain districts, unless exempted under the provisions of the Act, or when there is no opportunity of obtaining a pilot. The word "ship" being defined to include every description of vessel used in

J. C.

1909

ST. JOHN  
PILOT  
COMMISSIONERS  
v.  
CUMBERLAND  
RAILWAY  
AND COAL  
COMPANY.

J. C.  
1909  
ST. JOHN  
PILOT  
COMMISSIONERS  
V.  
CUMBER-  
LAND  
RAILWAY  
AND COAL  
COMPANY.  
—

navigation not propelled by oars, these barges are ships within the meaning of the section. Then comes the question whether they are ships which "navigate" within the district of St. John. The word "navigates" is, of course, used in the sense of "is navigated." From the context it appears that it is not used as descriptive of any particular kind of ship, or with any reference to her motive power, but is used in relation to something which a ship is caused to do; that is to say, so far as affects the present case, to perform a voyage into or out of the port of St. John.

There is nothing in the words of the section, when the definition of the word "ship" is considered, to indicate that at the time of moving in the pilotage waters a ship, to be under compulsion, must at the time possess independent practical power of moving herself. If that were so, it would seem to follow that any ordinary sailing vessel which was necessarily towed into port would not be within the section, and this can scarcely be the true meaning of the section. The argument that because the barges are towed they do not need a pilot will not alter the express language of the section, and, moreover, it is reasonably clear that although a pilot may not be so useful on large barges in tow of a tug as he would be if they were capable of making their own way into or out of port, yet the same argument would apply to any case of towage, even of a properly rigged sailing vessel, and yet, wherever pilotage is compulsory, the pilot is usually found on the tow where he can exercise such control of the navigation as is possible and give such directions and assistance as may be required. The fact that the tug may have more vessels than one in tow does not alter this position.

Their Lordships consider that the 58th section applied, and that the vessels in question were liable to the payment of pilotage dues unless exempted by the 59th section.

That section exempts "The following ships," and then in sub-ss. (a), (b), (c), (d), (e), and (f) it enumerates the ships exempted. It is important to notice again the use of the word "propelled" in the definition of the word "ship," for the second question turns mainly on the use of that word in sub-s. (c). In the definition clause the word "propelled" is obviously used

in its ordinary sense, and does not embrace the idea of traction. It is used as it was by Cicero—"propellere navem remis"—with reference to the motive power possessed by the vessel herself, and in this sense it is, in their Lordships' opinion, used in sub-s. (c). "Ships propelled wholly or in part by steam" are steamships which have either no motive power but their steam engines, or have steam engine power and some sailing power, and this is made plain by the actual use of the word "steamships" in the latter part of the said sub-section, where this word is used as equivalent to "ships propelled wholly or in part by steam." This express reference to steamships has a very important bearing on the construction of the earlier words of the sub-section, but the arguments and judgments given in the record do not touch upon it.

Provision is made in sub-s. (d) for the exemption of ships of not more than eighty tons registered tonnage, and in sub-s. (f) for the exemption in certain cases of ships not exceeding 250 tons registered tonnage. These provisions meet the case of ordinary barges within the limits of tonnage mentioned, but do not assist the respondents owing to the size of their barges. If the masters or mates of the barges had the necessary pilotage certificates, the barges would be exempt under the provision in sub-s. (e).

The statutes were again revised in 1906, and the 58th and 59th sections of the Pilotage Act (Revised Statutes of Canada, 1880, c. 80) were re-enacted in the Canada Shipping Act, 1906, c. 113, ss. 475 and 477, with some alterations which, however, do not seem to make any alteration with regard to the liability or exemption of such vessels as those in question. If it were material to consider this Act, the language used in the definition clause and other clauses would support the views now being expressed.

Their Lordships, after giving very full consideration to the case, have come to the conclusion that they are compelled to differ from the decisions below, which, as they at present stand, have been reached by placing a construction upon the Act which is founded on practical considerations (according to which it might be thought reasonable so to construe the Act that, having regard to the peculiar circumstances attending their navigation,

J. C.

1909

ST. JOHN  
PILOT  
COMMIS-  
SIONERS  
v.  
CUMBER-  
LAND  
RAILWAY  
AND COAL  
COMPANY.



J. C.  
1909  
ST. JOHN  
PILOT  
COMMIS-  
SIONERS  
v.  
CUMBER-  
LAND  
RAILWAY  
AND COAL  
COMPANY.

the barges in question should be exempted from pilotage) rather than upon a natural construction of the words used, and for the reasons given above they think that the construction which has been adopted is not in accordance with the proper and ordinary meaning of the language used in the statute. If it be thought right that these large sea-going barges should be exempted from pilotage dues, the matter will have to be dealt with by the Legislature.

Their Lordships will therefore humbly advise His Majesty to order that the verdict entered for the respondents and the judgments in the Courts below be set aside, and the verdict and judgment be entered for the appellants for \$735 with costs in the said Courts, to be paid by the respondents to the appellants.

The respondents must pay the costs of the appeal.

Solicitors for appellants: *Charles Russell & Co.*

Solicitors for respondents: *Linklater, Addison & Brown.*

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[HOUSE OF LORDS.]

H. L. (E.)	MACBETH & CO. . . . .	APPELLANTS ;
1910	AND	
Feb. 7.	CHISLETT . . . . .	RESPONDENT.

*Master and Servant—Compensation—"Seaman"—Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 13—Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 8.*

The definition of the word "seaman" in the Merchant Shipping Acts, 1854 and 1894, ought not to be imported into the Employers' Liability Act, 1880, which excludes seamen from its operation.

The respondent was injured while employed on board a steamship in helping to unmoor and warp her from one berth to another across a large dock in Liverpool. She was taken across by means of a tug and a rope and was at no moment entirely free from a quay, and did not use her steam or any motive power of her own. The respondent was not one of the ship's crew, and had not been to sea for several years.

In an action by the respondent against his employers the shipowners

to recover damages for the injury under the Employers' Liability Act, 1880:—

*Held*, that the respondent was not a "seaman" and was not excluded from the operation of the Act.

Decision of the Court of Appeal, [1909] 2 K. B. 811, affirmed.

H. L. (E.)

1910

MACBETH  
& Co.

v.

CHISLETT.

THE action in this case was brought in the county court at Liverpool. The jury awarded the respondent 50*l.* for damages and the learned judge gave judgment for him, holding that the definition in the Merchant Shipping Act did not apply "to a casual and temporary employment of this character when the vessel was not employed in a self-navigating manner but was being dragged by external power over an artificial water." This decision was reversed by the King's Bench Division (1) on the authority of *Corbett v. Pearce* (2), but was restored by the Court of Appeal (Cozens-Hardy M.R., Farwell and Kennedy L.JJ.). Hence this appeal.

*Horridge, K.C.*, and *Hyslop Maxwell*, for the appellants. The respondent's claim for damages under the Employers' Liability Act, 1880, is barred on two grounds—first, because he was a "person employed on board a ship" and was therefore a "seaman" within the definition of the Merchant Shipping Act, 1854, s. 2, and consequently excluded from the operation of the Act of 1880 by the combined effect of s. 8 of the Act of 1880 and s. 13 of the Employers and Workmen Act of 1875. Secondly, the claim is barred (apart from the Merchant Shipping Act, 1854) because he was in fact a seaman and employed as such when he was injured. By the Merchant Shipping Act, 1854, s. 2, the word "seaman" includes "every person" (except masters, pilots, and apprentices) "employed or engaged in any capacity on board any ship." That definition was repealed and re-enacted in s. 742 of the Merchant Shipping Act, 1894. By s. 8 of the Employers' Liability Act, 1880, the expression "workman" means any person to whom the Employers and Workmen Act, 1875, applies. By s. 13 of the Act of 1875 the Act does not apply to seamen. Therefore a seaman cannot avail himself of the Employers' Liability Act, 1880. The word "seaman" in the Act of 1875

(1) [1909] 2 K. B. 36.

(2) [1904] 2 K. B. 422.

H. L. (E.) 1910  
 MACBETH & CO,  
 v.  
 CHISLETT.

measn "seaman" as defined in the Merchant Shipping Act, 1854 : *Corbett v. Pearce*. (1) The same meaning was given to the word under the Conspiracy and Protection of Property Act, 1875 : *Reg. v. Lynch*. (2) See also *The Jane and Matilda* (3), *Reg. v. Judge of the City of London Court* (4), and *The Ruby* (No. 2). (5) These authorities all point the same way. The only adverse decision is the Scottish case of *Oakes v. Monkland Iron Co.* (6) The respondent may have been a "rigger" and a dock labourer, but that does not prevent him from being a seaman for the purpose of this employment.

*Leslie Scott, K.C.*, and *Hanbury Aggs*, for the respondent. In a statute the ordinary meaning of common words must be adopted, and not the meaning required in an Act passed for special purposes. The conception inherent in the word "seaman" involves navigation, membership of a crew, occupation at sea, i.e., present occupation. This man had been a seaman, but had not been engaged afloat for five years and did not contemplate exposure to maritime risks. The definitions of a statute are made for the purposes of the Act and not for those of the English language at large. [They urged the reasons adopted in the Court of Appeal and referred (*inter alia*) to *Bound v. Lawrence* (7), *Wilson v. Zulueta* (8), and *Oakes v. Monkland Iron Co.* (6)]

*Hyslop Maxwell* in reply.

LORD LOREBURN L.C. My Lords, I think there is no ground for disturbing the judgment of the Court of Appeal.

This man suffered from an accident, and it was agreed that he was entitled to recover under the Employers' Liability Act as a workman, unless it could be established that he was a "seaman" within the Act.

It was contended that he was a "seaman" on two grounds : In the first place, upon the ground that we were bound by the interpretation of the word "seaman" given in the Merchant Shipping

(1) [1904] 2 K. B. 422.

(2) [1898] 1 Q. B. 61.

(3) (1823) 1 Hagg. Adm. 187.

(4) (1890) 25 Q. B. D. 339.

(5) [1898] P. 59.

(6) (1884) 11 R. 579.

(7) [1892] 1 Q. B. 226.

(8) (1849) 19 L. J. (Q.B.) 49.

Act, 1854. I see no reason for introducing that Act in the construction of the word "seaman." The statute we are concerned with does not say that you are to apply the Act of 1854; and it would be a new terror in the construction of Acts of Parliament if we were required to limit a word to an unnatural sense because in some Act which is not incorporated or referred to such an interpretation is given to it for the purposes of that Act alone.

H. L. (E.)

1910

MACBETH  
& Co.

v.

CHISLETT.

Lord Loreburn  
L. C.

In the second place, Mr. Horridge said that apart from the Merchant Shipping Act, 1854, this man was in fact a seaman. It seems to me that that might well have been left to the jury. Even if the facts of a case were undisputed, it does not follow that the conclusion to be drawn from them is a matter of law—it may be a conclusion of fact. I think that the jury might well have been asked this question. We have, however, to decide the question, and I do not think this man can be regarded as a seaman within the Act.

I think the Court must see, first, whether he is by vocation a seafaring man, and, secondly, whether he is doing work connected with his duties or vocation of a seafaring man. Both of these elements are to be considered. If it were otherwise, then on the one hand a painter painting a ship in a dock or a mechanic called in to mend a valve in a dock or in a harbour would be a seaman, which he obviously is not; but we should have to say he was a seaman, for the duties he was discharging are duties often discharged by sailors and by engineers on board ship. On the other hand, if we did not regard both these elements, a seafaring man employed for some work, such as erecting a flagstaff on shore, would have to be regarded as a seaman, for that is his vocation. The truth is you have to regard all the circumstances, particularly those two to which I have adverted.

I think it is impossible to say as regards this man, who was a rigger and had not been to sea for five years, that his vocation was that of a seaman. I think this appeal must be dismissed.

LORD MACNAGHTEN. My Lords, I am of the same opinion. It seems to me there is no ground whatever for introducing the definition of the word "seaman" found in the Merchant



H. L. (E.) Shipping Act into the Employers' Liability Act. In the latter  
 1910 Act I think the word must have its ordinary signification. I do  
 not think the term can be properly applied to a person who is  
 not by occupation a seafaring man and is not at the time of  
 the accident employed in the ordinary duties of a seaman.

MACBETH  
 & CO.  
 v.  
 CHISLETT.

LORD ATKINSON. My Lords, I concur.

LORD COLLINS. My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, the present decision is in entire accord with *Oakes v. Monkland Iron Co.* (1) That case was decided in the Court of Session in 1884. The language of Lord Craighill has now been expressly adopted. It is in the following terms: "The interpretation of the word 'seamen' is not dependent upon the provisions of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104). There is no reference to that statute in the Employers' Liability Act of 1880 or in the Employers and Workmen Act of 1875. The Court are therefore not only at liberty but are called upon to adopt that which they think is the true meaning of the word to be interpreted as used in the Act of 1875, unfettered by the provisions of the Merchant Shipping Act, 1854."

It is satisfactory that with regard to both countries that is now the settled law of the land. I entirely concur with Farwell L.J. when he says, "On a question of this sort it is desirable that the decision in the Scottish Courts and in the Courts of this country" (namely, England) "should if possible be uniform."

The question, then, is simply, what in ordinary language is a seaman? Upon that subject I entirely agree with the observations of my noble and learned friend on the woolsack. In the course of the argument and to bring it to a point I put this simple illustration. This man, being a dock labourer, being engaged to assist in warping the vessel, was put to work at one end of the rope, and that end happened to be on board ship. If the end at which he worked had happened to be the shoreward end it was conceded by Mr. Horridge that, according to the quite

(1) 11 R. 579.

logical argument which he presented, this man would still have had to be constructively regarded as a "seaman," although in point of fact he might never in his life have been at sea or even on board a ship. I think that shews how far constructive arguments can be carried if they forsake the true, ordinary signification of a word in common use.

H. L. (E.)

1910

MACBETH  
& Co.

v.

CHISLETT.

*Order of the Court of Appeal affirmed and appeal dismissed with costs.*

*Lords' Journals, February 7, 1910.*

Solicitors: *Walker, Son & Field, for Weightman, Pedder & Co., Liverpool; Milner & Beckford, for Edward Lloyd, Liverpool.*

[HOUSE OF LORDS.]

RECTOR AND CHURCHWARDENS OF ST. }  
GEORGE, HANOVER SQUARE . . . . } APPELLANTS;

H. L. (E.)

1910

AND

Feb. 28.

WESTMINSTER CORPORATION . . . . RESPONDENTS.

*Burial—Disused Burial Ground—Letting of Unused and Unconsecrated Land—Application of Rents—Parish—Vestry—Church Property—Borough Council—Transfer of Powers and Duties—Exception of Ecclesiastical Powers and Duties—Burial Act, 1857 (20 & 21 Vict. c. 81), s. 24—London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 4, 23.*

Land bought with ecclesiastical funds was by a private Act (3 Geo. 3, c. 1.) vested in the rector and churchwardens of St. George, Hanover Square, for ever for a burial ground for the inhabitants of the parish. The rector and his successors were to have the burial fees. Under the direction of the vestry, the rector and churchwardens granted building leases of the unconsecrated part of the land. In 1854 the burial ground was closed by an Order in Council. As the building leases fell in and the buildings were pulled down the rector and churchwardens, under the direction of the vestry, granted fresh leases:—

*Held*, that the land was originally Church property and did not cease to be Church property by virtue of the Burial Act, 1857, and that on the passing of the London Government Act, 1899—which by s. 4 transferred the powers and duties of vestries to borough councils, but by s. 23

H. L. (E.)

1910

ST. GEORGE,  
HANOVER  
SQUARE  
(RECTOR AND  
CHURCH-  
WARDENS)

v.

WEST-  
MINSTER  
CORPORATION.

excepted any powers or duties relating to the affairs of the Church or any interest of a vestry in any Church property—the power and duty to direct the application of the proceeds of the leases did not pass to the Westminster Corporation as the borough council, but remained in the vestry under s. 24 of the Burial Act, 1857.

The question to what purposes the proceeds of the leases ought to be applied could not be determined in this litigation.

Decision of the Court of Appeal, [1909] 1 Ch. 592, reversed.

THE history of the land in question from 1757 to the present time is related in the report of the decision of Warrington J. (1) and in the report of the decision of the Court of Appeal (Cozens-Hardy M.R. and Fletcher Moulton L.J., Buckley L.J. dissenting). Both reports state the contentions on the two sides respectively. The Court of Appeal held that s. 24 of the Burial Act, 1857, empowered the vestry to apply the net rents of the houses for the benefit of the parish in any way they might think fit, whether secular or ecclesiastical, and that the power conferred by s. 24 was not a power relating to the affairs of the Church within the exception in the London Government Act, 1899, and consequently passed to the Westminster Corporation. Hence this appeal.

Feb. 8, 9, 28. *Danckwerts, K.C.*, and *Cave, K.C.* (*F. H. L. Errington* with them), for the appellants.

*Upjohn, K.C.*, and *J. Brooke Little* (*J. M. Gover* with them), for the respondents.

*Danckwerts, K.C.*, in reply.

LORD LOREBURN L.C. My Lords, I think this appeal ought to be allowed. We have been taken over ground more agreeable than relevant, but the question is really a very short one.

The only point is that stated by Buckley L.J. at the beginning as follows: "The whole question in this case is whether having regard to the legislation since the year 1857 the borough council is the authority which in s. 24 of the Burial Act, 1857, is called 'the vestry of such parish.'"

I think that at all events one party to this litigation desires a different question to be decided, namely, whether whoever is to

(1) [1908] 2 Ch. 600.

give the directions is bound to direct the moneys to be applied to ecclesiastical purposes or not. I do not propose to answer that question, which is not raised and I think ought not to be answered in the absence of the Attorney-General. If this matter goes before a learned judge, he will hold himself free. The Court of Appeal, like your Lordships' House, had in my opinion no authority to decide that question in this litigation. The cestuis que trust were all through the inhabitants, and the trustees had only a limited interest. I make that observation, but I do not desire to indicate an opinion upon the conclusion that is to follow. It certainly does not follow from the decision of your Lordships' House, one way or another, for what purposes this money is to be applied.

H. L. (E.)  
 1910  
 ST. GEORGE,  
 HANOVER  
 SQUARE  
 (RECTOR AND  
 CHURCH-  
 WARDENS)  
 v.  
 WEST-  
 MINSTER  
 CORPORA-  
 TION.  
 Lord Loreburn  
 L.C.

The real question is, as stated by Buckley L.J., whether the plaintiffs are the successors of the vestry in exercising this duty. It is clear that they are successors of the vestry, but the statute of 1899 excepts from the duties which are to pass to the corporation "any powers or duties of a vestry which relate to the affairs of the Church or any interest of a vestry in any Church property."

Now the state of things in 1899 was this: The rector and churchwardens were owners in fee of this land, with a liability to make certain payments on the part of the churchwardens, and a right, now suspended, in respect of the land itself, in the rector to receive certain profits in respect to the land. The liability to pay the money still remains; the suspended or possible right in the rector to receive fees, although it is practically extinguished, may not in law be entirely gone, although it is fruitless. This property was bought with Church money, and in my opinion it was Church property. But it is said that by the Act of 1857, though it might originally have been Church property, it was disconnected from Church affairs, and ceased to be Church property by virtue of the Act of 1857. The Act of 1857 did not divest the rector and churchwardens of this land; they are still the owners. Under these circumstances I think the duty of the vestry "relates to the affairs of the Church." I think also that it was an interest in Church property; that is to say, a right to direct the application of the proceeds of Church



H. L. (E.) 1910  
 ST. GEORGE,  
 HANOVER  
 SQUARE  
 (RECTOR AND  
 CHURCH-  
 WARDENS)  
 v.  
 WEST-  
 MINSTER  
 CORPORA-  
 TION.

property was given to the vestry in 1857 and has not passed to the corporation. That being the only question for decision, I move your Lordships to allow this appeal.

LORD MACNAGHTEN. My Lords, I am of the same opinion. Having regard to the provisions of the Act of 3 Geo. 3, I think the land bought for the purposes of a burial ground, and called a burial ground in that Act, was Church property within the meaning of that expression as used in the London Government Act of 1899. I also think, under the Burial Act of 1857, the vestry, claiming an interest in the burial ground, obtained and had, at the time of the passing of the London Government Act, an interest in Church property, and not the less so because they were given the right to direct the application of the net proceeds of the sale or letting of that land. As to what the vestry could do under the power of direction under the Act of 1857 I give no opinion. That question is not before us on this appeal, and in my judgment it ought not to be deemed to be in any way concluded by any opinion that has been expressed in this case. The question, and the only question, as Buckley L.J. said, is not as to the proper destination of the funds, but as to the identity of the vestry, in whom the power of disposal of the funds is vested.

I agree with the Lord Chancellor that the appeal ought to be allowed.

LORDS ATKINSON, COLLINS, and SHAW OF DUNFERMLINE concurred.

*Order of the Court of Appeal reversed, the respondents to pay the costs of this appeal; the orders as to costs in the Courts below to be undisturbed.*

*Lords' Journals, February 28, 1910.*

Solicitors: *Capron & Co ; Allen & Son.*

[HOUSE OF LORDS.]

HODGSON . . . . .	APPELLANT ;	H. L. (E.)
AND		1910
OWNERS OF THE WEST STANLEY } COLLIERY . . . . . }	RESPONDENTS.	<u>March 3.</u>

*Employer and Workman — Compensation — Father and two Sons killed — Dependency, total and partial—Common Fund—Workmen’s Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13 ; First Sched. (1.) (a).*

A father and his two sons, workmen in the same employment, were killed by one and the same accident. The earnings of all three formed a common fund out of which the whole family was maintained. The mother and her surviving children (none of whom earned wages) were as a matter of fact dependent upon the earnings of each and all of the three deceased :—

*Held*, that the mother and her surviving children were entitled to compensation in respect of each of the three deaths under the Workmen’s Compensation Act, 1906.

Decision of the Court of Appeal (not reported) reversed.

*Senior v. Fountains*, [1907] 2 K. B. 563, and *McLean v. Moss Bay Co.*, [1909] 2 K. B. 521, overruled. On April 15, with the consent of the respondents, the House reversed the decision of the Court of Appeal in *McLean v. Moss Bay Co.* on the question of the wife’s dependency and made an award in her favour for 30*l.* and costs.

The circumstances of this appeal are stated in the judgment of Lord Macnaghten.

Jan. 27. *Isaacs, K.C.* (*Lowenthal* with him), for the appellant. The question of dependency under the Act is one of fact to be determined by the evidence in each case. The question here is by whom was the applicant in fact maintained. Where the father and other members of the family contribute to the common support it is not true to say that the dependency is on the father alone. The compensation provided by the Act is for the loss of a breadwinner. That is the principle of *Main Colliery Co. v. Davies* (1), where the distinction was drawn between dependency and partial dependency. Here there was not total dependency on the father, but a partial dependency on

(1) [1900] A. C. 358.

H. L. (E.) 1910  
 HODGSON  
 v.  
 WEST  
 STANLEY  
 COLLIERY.  
 —

him and on each of the sons. The measure of loss is the wages paid into the common fund. All that can be considered is the actual earnings and expenditure, as Lord Davey said in *Main Colliery Co. v. Davies*. (1) Dependency is purely a matter of fact, not of law, and so far as *Senior v. Fountains* (2) and other cases treat it as one of law they were wrongly decided. The question was rightly treated as one of fact in *Simmons v. White* (3) and in Buckley L.J.'s dissenting judgment in *McLean v. Moss Bay Co.* (4) See also *Cunningham v. McGregor* (5); *Sneddon v. Addie & Sons* (6); *Turners v. Whitefield* (7); *Pryce v. Penrikyber Co.* (8); *Rees v. Penrikyber Co.* (9)

*Sir Robert Finlay, K.C.*, and *Mitchell-Innes, K.C.* (*Griffith-Jones* with them), for the respondents. The appellant was wholly dependent upon her husband and not partly dependent upon her two sons. The question of dependency is, no doubt, one of fact, but it is subject to a rule of law. In the case of a husband there is a presumption of sole dependency and it is immaterial whether in fact the husband contributed to the wife's maintenance. In *Williams v. Ocean Coal Co.* (10) Cozens-Hardy M.R. said "Dependency must always be a mixed question of law and of fact." The Act fixes a maximum which cannot in any circumstances be exceeded. By s. 1 (a) of the First Schedule the award cannot be greater than 300*l.*, though it may enure to the benefit of several persons. There was only one accident and only one cause of action. Where contributions are made to a common fund they are in law held to be paid to the father. That was the assumption throughout in *Main Colliery Co. v. Davies*. (1) The circumstance that the actual payment was to the mother is irrelevant. The obligation is "upon the head of the family," as Lord Halsbury L.C. said, and there cannot be a dependency partly on the father and partly on the sons. The father being wholly responsible, there can be no further liability arising out of the same accident. To allow this appeal would be to overrule

(1) [1900] A. C. 358.

(2) [1907] 2 K. B. 563.

(3) [1899] 1 Q. B. 1005.

(4) [1909] 2 K. B. 521.

(5) (1901) 3 F. 775.

(6) (1904) 6 F. 992.

(7) (1904) 6 F. 822.

(8) [1902] 1 K. B. 221.

(9) [1903] 1 K. B. 259.

(10) [1907] 2 K. B. 422.

all the cases where the whole family has been held dependent on the father's earnings, though children may have contributed to the joint income. *Senior's Case* (1) and *McLean's Case* (2) were rightly decided, and a wife cannot claim to be dependent on the earnings of a member of the family whose wages were put into the common stock.

No reply was called for.

The House took time for consideration.

March 3. LORD LOREBURN L.C. My Lords, in this appeal a widow, whose husband and two sons were killed in a colliery accident on February 16, 1909, claimed compensation under the Workmen's Compensation Act upon the ground that she and her six surviving children were in fact dependent upon the earnings of all the three deceased. If the fact is to be taken to be as it undeniably was, the widow and six children were so dependent; for the earnings of the three deceased, amounting to upwards of 2*l.* a week for each of them, formed one common fund out of which the whole household was maintained.

Liability in respect of the death of the husband is admitted, but two objections are raised to her receiving compensation in respect of her two sons' deaths.

The first objection is that though there were three deaths in this accident, yet the applicant cannot recover more than the maximum provided in the schedule in respect of one workman's death. There is not a word in the Act to justify this contention. The Act does not say that a dependant cannot receive more than the maximum, but only that an employer shall not be required to pay more than the maximum in respect of one workman's death. How that can limit the employer's liability to the same sum, whether the number of deaths be one or two or three, I cannot understand. This point does not really deserve attention. I think it was not argued in the Courts below.

The second objection, when analysed, is as follows: It was argued that the mother was, in the eye of the law, wholly dependent upon her deceased husband, and, being so, could not possibly be in any degree dependent upon her two deceased sons; for that

H. L. (E.)

1910

HODGSON

*v.*

WEST

STANLEY  
COLLIERY.

(1) [1907] 2 K. B. 563.

(2) [1909] 2 K. B. 521.



H. L. (E.)  
 1910  
 ~~~~~  
 HODGSON
 v.
 WEST
 STANLEY
 COLLIERY.
 ~~~~~  
 Lord Loreburn  
 L.C.  
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would involve a logical contradiction. This supposed doctrine of law was, to begin with, presented to your Lordships as an inexorable rule. Later on Mr. Mitchell-Innes so far unbended as to admit that it might be only a rebuttable presumption. But when asked if the presumption could be rebutted by conclusive proof that it was diametrically opposed to the fact, as here, he would not admit that it could be so rebutted. How a presumption could be better rebutted I really do not know. In this argument I am told that I am by law required to affirm something as the truth which every one knows to be entirely false. The short answer is that the law requires no such thing. There are such things as legal fictions, which have a peculiar history of their own, but this is not one of them. The mother was not, in law, wholly dependent on her deceased husband. She and her family were dependent upon those who supplied them with the means of subsistence, namely, in the present case, her husband and each of her two deceased sons.

My Lords, the Court of Appeal, in deciding this case, purported to follow earlier decisions in *Senior v. Fountains* (1) and *McLean v. Moss Bay Co.* (2) In the last-named case Buckley L.J. delivered a dissenting judgment, which seems to me quite unanswerable. I think the error, if I may respectfully so designate it, arose from a misconception of the language used by Lord Halsbury in your Lordships' House in *Main Colliery Co. v. Davies*. (3) The question there was whether a father could be said to be in part dependent upon his son's earnings where the son contributed to the family wages fund, and the father received the contributions and spent them in maintaining himself and his family. The answer was obviously Yes; and Lord Halsbury, referring to some argument at the Bar, said that the father was so dependent because he was helped by the son to discharge his legal duty of maintaining his family. Hence it seems to have been inferred that the mother must be wholly dependent on the father and could not therefore be dependent on the son's contribution. I find it difficult to follow the reasoning.

(1) [1907] 2 K. B. 563.

(2) [1909] 2 K. B. 521.

(3) [1900] A. C. 358.

It is one thing to say that in a particular case a father is partly dependent on his son's contributions because they assist him in discharging his legal duty of maintaining his family. It is quite a different thing to say that in all cases while the father is alive the mother is wholly dependent upon him. I do not see that the latter proposition in any way flows from the former.

My Lords, this Act of Parliament has its difficulties, as your Lordships are well aware. But so far as the present subject is concerned its provisions are simple enough. If a workman is killed in an accident, all who are dependent upon him (within the prescribed limits of kinship) may claim compensation from the employer. If two workmen are killed, they may twice claim, and so on according to the number of workmen killed. The employer is protected by a statutory limit of liability in regard to each of the deaths. It is for the arbitrator or county court judge to ascertain, purely as a question of fact, who are dependent and to what extent, and what they are to receive, and how the compensation is to be distributed among the dependants, if there be more than one, in accordance with the directions of the Act. There is no room that I can see for legal presumptions.

Accordingly I move your Lordships to allow this appeal, and to declare, as the evidence is all one way, that Mary Hodgson and her surviving children were dependent upon the earnings of the three deceased, Anthony Hodgson, Joseph Hodgson, and Sydney Hodgson, and that Mary Hodgson and her surviving children are entitled to receive compensation in respect of the deaths of each of the deceased persons, and that the case be remitted to be determined accordingly.

In regard to the directions asked for in the special case, the learned county court judge says that, if at liberty so to decide, he would have awarded three sums of 250*l.*, 100*l.*, and 150*l.* respectively. I see no objection.

But I must add this observation. It would be an erroneous view to hold that because the widow was only partially dependent upon the husband's earnings therefore she cannot receive the full sum of 300*l.* in respect of his death. Her loss by his death may be 300*l.* though she was only partially dependent upon him. I do not say that it was so in this case. But I make

H. L. (E.)

1910

HODGSON

v.

WEST
STANLEY
COLLIERY.Lord Loreburn
L.C.

H. L. (E.)
 1910
 HODGSON
 v.
 WEST
 STANLEY
 COLLIERY.
 Lord Loreburn
 L.C.

this observation because the county court judge tells us that if she was wholly dependent on the father he would award 300*l.*, and if she was partially dependent on the father he would award 250*l.* What has to be awarded in case of partial dependency is "such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants." The sum is to be proportioned to the injury. It is for the committee to say what is reasonable and proportionate to the injury.

LORD MACNAGHTEN. My Lords, this appeal raises a question of some importance under the Workmen's Compensation Act, 1906. The answer seems to be simple enough if regard is to be had to actual facts and to the plain language of the statute.

One Anthony Hodgson and two of his sons were in the employment of the owners of the West Stanley Colliery in Durham.

The two sons, who were unmarried, lived at home with their father and mother and six younger children.

Both the sons gave the whole of their earnings to their parents. Their earnings, with the wages received by the father, formed one common fund out of which the family was maintained. No wages were earned by any of the younger children.

The father and the two wage-earning sons were killed in the course of their employment by one and the same accident on February 16, 1909.

Thereupon the widowed mother applied for compensation under the Act on the footing that she and her surviving children were dependent on the earnings of each and all of the three deceased workmen. Each of the three at the time of the accident was in receipt of wages which would have entitled his dependants, if wholly dependent upon him, to the maximum amount of compensation.

The owners of the colliery, who are respondents to this appeal, contended that the widow and the surviving children were wholly dependent on the father's earnings, and that in respect

of the deaths of the two sons the award must be limited to the expenses of burial.

The application came before a representative committee. The committee submitted the matter to the county court in the form of a special case, with a request that if the Court should be of opinion that the contention of the applicant was correct the case should be remitted to the committee "with such directions with respect to the amount or measure of compensation payable by the respondents as to the Court might seem meet."

The special case was argued before his Honour Judge O'Connor. In a judgment which met, I think, with your Lordships' entire approval that learned judge gave cogent reasons for determining the question in favour of the applicant, but, in deference to two recent decisions in the Court of Appeal, he came to the conclusion that he was bound to give effect to the contention raised on behalf of the employers.

From this decision the widow appealed. The appeal was dismissed with costs, on the ground that the question was concluded by the decisions cited before the learned county court judge, *Senior v. Fountains* (1) and *McLean v. Moss Bay Co.* (2)

In this House the learned counsel for the respondents began by suggesting that the three deaths occurring as they did at the same moment of time, and being caused by one and the same explosion, ought to be regarded as one single fatal accident entitling the widow and orphans to an award of 300*l.* and nothing more. It is enough to say that there is no foundation for such a suggestion. It is opposed to the spirit and to the language of the enactment. Injuries by accident in all cases throughout the Act are dealt with individually as involving separate liability in each case.

Passing from this point the learned counsel pressed upon your Lordships considerations which, whether they are legitimate or not, seem to have had effect sometimes. He warned your Lordships that a decision in favour of the applicant would in many cases tell against the interests of workmen. It was, he said, the general rule, if not the invariable practice, to refuse the maximum amount of compensation in cases of partial dependency.

H. L. (E.)

1910

HODGSON

v.

WEST
STANLEY
COLLIERY.Lord
Macnaghten.

(1) [1907] 2 K. B. 563.

(2) [1909] 2 K. B. 521.

H. L. (E.) If such be the practice, all I can say is that no warrant for it
 1910 can be found in the Act. The maximum compensation in cases
 HODGSON of partial dependency is just the same as it is in cases of total
 v. dependency. In a proper case the arbitrator is at liberty to
 WEST award compensation on the highest scale, and he ought to do so
 STANLEY if such an award seems to him to be reasonable and proportionate
 COLLIERY. to the injury. In a case like the present, where a workman is
 Lord killed, leaving a widow and six children, the youngest being only
 Macnaghten. two years old, no one could say that an award on the highest
 scale would be unreasonable or disproportionate to the loss to
 the dependants, though not wholly dependent on his earnings.

On the real point at issue there is very little to be said. The question of dependency is not a question of law at all. It is purely a question of fact. If authority is wanted for a proposition so self-evident, there is the case of *Main Colliery Co. v. Davies* (1), a decision of this House in which there is an explicit statement to that effect. The view of the Court of Appeal seems to be based on a misconception of Lord Halsbury's judgment in that case. Nothing could be plainer than his Lordship's language: "What the family was, in fact, earning, what the family was, in fact, spending, for the purpose of its maintenance as a family, seems to me," says his Lordship, "to be the only thing which the county court judge could properly regard." He does, no doubt, refer to the legal obligation on the father to maintain his family, but only, I think, for the purpose of explaining that the learned judge was justified in coming to the conclusion at which he arrived without taking a strict account of the father's receipts or requiring an analysis of his expenditure. On this slender basis a theory seems to have been constructed, to the effect that you must shut your eyes to the sources from which the contributions to the family maintenance come; that you must look to the father and the father alone; and that what he spends on the maintenance of the family must be deemed to be his in fact because it may have been his in law.

It seems to me, with all respect to the Court of Appeal, that the more recent decisions of that Court, on which the judgment

(1) [1900] A. C. 358.

under appeal is founded, cannot be supported. I agree in the dissentient judgment of Buckley L.J. in *McLean v. Moss Bay Co.* (1), and in the earlier decisions of the Court of Appeal in which my noble and learned friend Lord Collins took part as Master of the Rolls.

I am therefore of opinion that the appeal should be allowed, with costs here and below, and the case remitted to the committee with a declaration that the applicant was dependent on each and all of the three deceased workmen.

It rests with the committee to determine the proper amount of compensation. But as the committee has asked for directions on the matter, it may be permissible to say that the aggregate amount of compensation which the learned county court judge intimated he would have allowed if he had been free to decide the question seems to be fair and reasonable. But, speaking for myself, I venture to think that it would be more consonant with the spirit and intention of the Act if the full amount of compensation were awarded in respect of the father's death, and the balance of the sum proposed to be allowed apportioned in respect of the deaths of the two sons.

LORD COLLINS. My Lords, I have had an opportunity of reading the judgment of my noble and learned friend the Lord Chancellor, and I entirely agree with it.

LORD SHAW OF DUNFERMLINE. My Lords, the respondents have put forward an argument to the effect that there having been only one accident, and a maximum award having been made in respect of the death of one victim, namely, the father, the statutory remedy has been exhausted, and no further award can be made to the appellant in respect of the death of her two sons, who were also workmen, and in the same accident lost their lives. It is sufficient for me to say that I think such an argument is totally without warrant from the terms of the statute.

On one other matter, apart from the real question for determination in this case, I wish to remark. I express my entire concurrence with the views of the noble and learned Lord on the woolsack as to the fixing of the scale of compensation in cases of

H. L. (E.)

1910

HODGSON

v.

WEST

STANLEY
COLLIERY.Lord
Macnaghten.

(1) [1909] 2 K. B. 521.

H. L. (E). partial dependency. Indications not infrequently appear of an opinion that the maximum awards apply only to cases of total dependency and not to partial dependency. The latter, however, is not so. The statute merely provides (Sched. I., s. (a) (ii.)) that in the case of partial dependency the maxima for total dependency shall not be exceeded. Within that limit the arbitrator is free to do his best to make the compensation meet the loss, according to the circumstances of the case.

1910
HODGSON
v.
WEST
STANLEY
COLLIERY.

Lord Shaw of
Dunfermline.

The material finding in fact in the special case is: “(5.) Both the deceased sons gave all their earnings to their parents, and such earnings, together with the earnings of the deceased father, formed one common fund out of which the whole household was maintained.”

The statement, both of the facts of the case and of the position of the legal decisions as made by the county court judge, is eminently satisfactory and clear. He says plainly “The sons’ wages, together with the father’s, formed one common fund out of which the household was maintained.” And he puts the fact illustratively thus: “If the mother had been asked on the morning of the 16th February what she and her family had to live on she would have answered truly ‘Upon the earnings of my husband and my two boys.’”

My Lords, this being the actual fact, it would, apart from certain decisions and their consequences to which I shall refer, seem difficult to see how a Court of law would reach the conclusion that the wife must, contrary to that fact, be held to have been constructively wholly dependent on her husband’s earnings and constructively not dependent on her sons’. It seems late in the day to reiterate that the question of dependency is one of fact. The statute of 1906 so treats it in the 8th section of Sched. I., and the fact is to be found by arbitration or the county court. Sect. 5 of the First Schedule of the Act of 1897 is substantially to the same effect. In four separate judgments my noble and learned friend Lord Collins (then Master of the Rolls) has most clearly laid this down. I refer to the cases of *Simmons v. White* (1), *Bevan v. Crawshay* (2), *Howells v. Vivian* (3), and

(1) [1899] 1 Q. B. 1005.

(2) (1901) 85 L. T. 496.

(3) (1901) 85 L. T. 529.

Pryce v. Penrikyber Co. (1) According to the judgments of the Court of Appeal in these cases, whether dependency exists, whether it is whole or whether it is partial, all these are questions of fact.

In Scotland the matter was so treated by Lord President Kinross and his colleagues of the First Division in *Turners v. Whitefield*. (2) In that case a husband and wife had lived in voluntary separation for fourteen years prior to his death by accident, and the Lord President says: "It was stated by the Lord Chancellor, in giving judgment in *Main Colliery Co. v. Davies* (3), that the question whether a person was a dependant in the sense of the Act is a question of fact. The respondent in the present case was not supported by nor was she receiving any contribution towards her support from the deceased, and it appears that she was not to any extent relying on him for her support. In other words, she was not in fact dependent upon him, and I am therefore of opinion that she was not dependent upon his earnings within the meaning of the Workmen's Compensation Act, 1897, so as to entitle her to compensation from the appellants."

As I have stated, not only whether dependency exists but whether it is whole or is partial are questions of fact. In the *Penrikyber Case* (1) Lord Collins said: "I understand, by the words wholly dependent, that there was no other source of income during the life of the deceased other than his earnings on which the applicant was dependent." And Stirling L.J. said: "Put broadly, the test raised by the Act is whether what the workman was earning at the time of his death was the sole source to which the applicant could have looked for maintenance at that time."

I respectfully agree with the soundness of those views, and so regarding them I concur with Buckley L.J. in thinking that it is—if they are to be given effect to—impossible to hold in the present case that the applicant was wholly dependent on her husband's earnings. To do so would be not to accept, but to controvert, the facts as found.

My Lords, I think that the decisions cited and the opinion

(1) [1902] 1 K. B. 221.

(2) 6 F. 822.

(3) [1900] A. C. 358.

H. L. (E.)

1910

HODGSON

v.

WEST

STANLEY
COLLIERY.

Lord Shaw of
Dunfermline.

H. L. (E.)

1910

HODGSON

v.

WEST

STANLEY
COLLIERY.Lord Shaw of
Dunfermline.

above expressed are in complete accord with the judgments, especially of Lord Halsbury and Lord Davey, in *Main Colliery Co. v. Davies*. (1) Lord Halsbury says: "The whole family were all dependent upon the wages. Whose wages? Partly this boy's wages." . . . "What the family was, in fact, earning, what the family was, in fact, spending, for the purpose of its maintenance as a family, seems to me to be the only thing which the county court judge could properly regard." My Lords, how has this decision been regarded? For an answer one must turn to *Senior's Case*. (2) Because the father was treated as head of the family and bound to the extent of his means to support it, and was "relying or dependent—call it what you please—for the means by which he discharges his legal obligation upon the funds supplied to him or partly supplied to him by the children who can earn those funds," therefore—so the conclusion appears to run—the wife and family are wholly dependent on the father. This humbly appears to me to upset the notion, supported in the *Main Colliery Case* (1), and so entirely in accordance with fact, of a family fund to which various members of the family contribute, and directly to contradict the view of Lord Davey.

With much respect to the Court of Appeal, I think that the case of *Senior* was founded on misapprehension and was erroneous. And I must venture to add this. In *Senior's Case* (2) the county court judge came to the conclusion "that the mother and younger children were not wholly dependent on the father's earnings." I think that that was a conclusion and finding in fact. In reversing that conclusion the Court were truly reversing a conclusion in fact; and the finding or opinion that the mother and children must be treated as wholly dependent on the father's earnings was a departure from the fact found. Such a departure was not, in my opinion, competent to a Court of legal review.

Following the judgment in *Senior's Case* (2) came that of *McLean v. Moss Bay Co.* (3), in regard to which I concur in the dissentient judgment of Buckley L.J., and the present case, in

(1) [1900] A. C. 358.

(2) [1907] 2 K. B. 563.

(3) [1909] 2 K. B. 521.

which I fully share the opinion of the learned county court judge on which I have commented. As to the Irish case of *Reg. v. Clarke* (1), it follows, from the opinion above delivered, that I agree with the dissenting opinion of that distinguished judge the late Fitzgibbon L.J.

H, L. (E.)

1910

HODGSON

v.

WEST

STANLEY
COLLIERY.

Order of the Court of Appeal reversed with costs here and below. Declaration that the applicant and her surviving children were dependent upon the earnings of all the three deceased and are entitled to receive compensation in respect of the deaths of each of the deceased persons; and that the committee do decide what sum is reasonable and proportionate to the injury of the said dependants in respect of each of the said deaths.

Lords' Journals, March 3, 1910.

Solicitors : *Hyman Isaacs & Lewis, for Isaacs & Heath, Sunderland; Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-on-Tyne.*

(1) [1906] 2 I. R. 135.

[HOUSE OF LORDS.]

H. L. (E.) CLOVER, CLAYTON & CO., LIMITED . . APPELLANTS ;

1910

AND

March 14. HUGHES RESPONDENT.

Employer and Workman—Accident—Disease—Workmen’s Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1.

A workman suffering from serious aneurism was employed in tightening a nut by a spanner when he suddenly fell down dead from rupture of the aneurism. The county court judge found upon conflicting evidence that death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal :—

Held by Lord Loreburn L.C. and Lords Macnaghten and Collins (Lords Atkinson and Shaw of Dunfermline dissenting), that there was evidence to support the finding, and that it was a case of “personal injury by accident arising out of and in the course of the employment” within the Workmen’s Compensation Act, 1906.

Decision of the Court of Appeal, [1909] 2 K. B. 798, affirmed.

THE circumstances of this appeal are stated in the judgments. The county court judge held that there was an accident within the meaning of the Act and awarded compensation to the respondent, the widow of the deceased workman. This decision was affirmed by the Court of Appeal (Cozens-Hardy M.R., Farwell and Kennedy L.JJ.). Hence the present appeal.

Jan. 31, Feb. 1. *Simon, K.C.*, and *Cuthbert-Smith*, for the appellants. The cause of death was heart disease, not accident. The disease was so advanced that death might have happened at any moment without exertion. An accident must be fortuitous, unforeseen, unexpected. The decision below goes far beyond *Fenton v. Thorley* (1), where there was manifest over exertion. In the present case the operation and effort required were quite ordinary. *M’Innes v. Dunsmuir & Jackson* (2) was another case of strain, and these two authorities have no application ; nor are those cases in point in which some external force intervened, as in *Brintons v. Turvey* (3), where an anthrax bacillus lighted on a man’s eye and he contracted the

(1) [1903] A. C. 443. (2) (1908) S. C. 1021.
(3) [1905] A. C. 230.

disease, and *Ismay v. Williamson* (1), where the accident was caused by a heat-stroke from a furnace. To be an accident the event must arise out of and in the course of the employment. In *Wicks v. Dowell & Co.* (2) compensation was given where a man subject to epilepsy fell in a fit into a ship's hold, whither his work took him. *Coe v. Fife Coal Co.* (3) is nearer the present case and was rightly decided. The man was held to have suffered from heart disease and not from strain, which was the basis of the claim. Two elements must co-exist—injury, and accident causing the injury. Here there was no accident. The constituents of “accident” under the Act are stated in *Fenton v. Thorley* (4), especially in Lord Macnaghten's judgment, and are not found in the present case.

Powell, K.C. (*Stewart-Brown* with him), for the respondent. The deceased workman in the reasonable performance of his duties sustained a physiological injury as the result of the work in which he was engaged and his death resulted from that injury. That is the test given by Lord M'Laren in *Stewart v. Wilsons and Clyde Coal Co.* (5) and approved by Lord Macnaghten in *Fenton v. Thorley*. (4) The fact that the man was suffering from disease is immaterial. There is no standard or normal man in view of workmen's compensation any more than, in another sphere of thought, there is an “economic man.” In *Ismay v. Williamson* (1) the man was in an emaciated condition. This man overstrained his powers, slight though they were, as Fenton was ruptured in the course of his work. The Act gives compensation for injury by accident “arising out of and in the course of the employment.” It does not say “caused by the employment.” The death of this man fulfils all the conditions of an accident given in *Fenton v. Thorley*. (4) It is a question of fact to be determined by the arbitrator, whose finding cannot be impeached. The accident was due to strain as much as it was in *Fenton v. Thorley* (4), or in *Boardman v. Scott* (6), or in the Scottish case of *M'Innes v. Dunsmuir & Jackson*. (7) In

H. L. (E.)

1910

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CLOVER,
CLAYTON
& Co.,
LIMITED
v.
HUGHES.

(1) [1908] A. C. 437.

(4) [1903] A. C. 443.

(2) [1905] 2 K. B. 225.

(5) (1902) 5 F. 120.

(3) (1909) S. C. 394.

(6) [1902] 1 K. B. 43.

(7) (1908) S. C. 1021.

H. L. (E.) *Coe v. Fife Coal Co.* (1) the man was simply overtired by his work.

1910

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CLOVER,
CLAYTON
& Co.,
LIMITED

v.
HUGHES.

Cuthbert-Smith in reply.

The House took time for consideration.

March 14. LORD LOREBURN L.C. My Lords, in this case a workman, suffering from an aneurism in so advanced a state of disease that it might have burst at any time, was tightening a nut with a spanner, when the strain, quite ordinary in this quite ordinary work, ruptured the aneurism and he died. This is a mere summary of the facts. They and the learned county court judge's conclusions from them are stated fully in his instructive judgment. In what I am about to say I take the facts as he found them in extenso and rely upon them.

He has held, and the Court of Appeal have confirmed his decision, that in these circumstances the workman's dependants are entitled to compensation. I agree. These judgments make it unnecessary, from my point of view, that I should review the authorities, which I wish loyally to follow. But in a case of such great importance in the construction of this Act I wish to state my own view as to its meaning in the light of the weighty opinions which have been cited to us in argument.

It seems to me important that we should regard not merely the question "Was this an accident or not?" but also the entire sentence at the commencement of the Act of 1906, in which the liability of the employer to make compensation is set up. It runs as follows: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act." The injury must be caused by an accident, and the accident must arise out of the employment. We are not concerned here with the course of employment.

What, then, is an "accident"? It has been defined in this House as "an unlooked for mishap or an untoward event, which is not expected or designed." All the Lords who took part in the decision of *Fenton v. Thorley* (2) agreed in substance with this

(1) (1909) S. C. 393.

(2) [1903] A. C. 443.

definition in Lord Macnaghten's speech. I take that as conclusive. H. L. (E.)

Next, the accident must be one "arising out of" the employment. There must be some relation of cause and effect between the employment and the accident, as well as between the accident and the injury.

My Lords, I think some of our difficulties in applying the Act are due to this. Courts of law have frequently been obliged to consider, especially in actions on policies of insurance, what is to be regarded as the cause of some particular event. In one sense every event is preceded by many causes. There is the "causa proxima," the "causa causans," the "causa sine qua non." I will not pursue scholastic theories of causation. The "causa proxima" is alone considered in actions on a policy, as a general rule. I do not think that is the proper rule for cases under the section now under discussion, for the reasons explained by Lord Lindley in *Fenton v. Thorley*. (1) It seems to me enough if it appears that the employment is one of the contributing causes without which the accident which actually happened would not have happened, and if the accident is one of the contributing causes without which the injury which actually followed would not have followed. And if this be so, it affords a guidance through the formidable arguments propounded by Mr. Simon on behalf of the appellants.

This man died from the rupture of an aneurism, and "the death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal." Again, "the aneurism was in such an advanced condition that it might have burst while the man was asleep, and very slight exertion, or strain, would have been sufficient to bring about a rupture." These are the findings and they bind us.

The first question here is whether or not the learned judge was entitled to regard the rupture as an "accident" within the meaning of this Act. In my opinion he was so entitled. Certainly it was an "untoward event." It was not designed. It was unexpected in what seems to me the relevant sense,

(1) [1903] A. C. 443.

1910

CLOVER,
CLAYTON
& CO.,
LIMITED
v.
HUGHES.

Lord Loreburn
L.C.

H. L. (E.)

1910

~
 CLOVER,
 CLAYTON
 & CO.,
 LIMITED
 v.
 HUGHES.

Lord Loreburn
 L.C.
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namely, that a sensible man who knew the nature of the work would not have expected it. I cannot agree with the argument presented to your Lordships that you are to ask whether a doctor acquainted with the man's condition would have expected it. Were that the right view, then it would not be an accident if a man very liable to fainting fits fell in a faint from a ladder and hurt himself. No doubt the ordinary accident is associated with something external; the bursting of a boiler, or an explosion in a mine, for example. But it may be merely from the man's own miscalculation, such as tripping and falling. Or it may be due both to internal and external conditions, as if a seaman were to faint in the rigging and tumble into the sea. I think it may also be something going wrong within the human frame itself, such as the straining of a muscle or the breaking of a blood vessel. If that occurred when he was lifting a weight it would be properly described as an accident. So, I think, rupturing an aneurism when tightening a nut with a spanner may be regarded as an accident. It cannot be disputed that the fatal injury was in this case due to this accident, the rupture of the aneurism under the strain.

That, of itself, does not dispose of the case. It establishes that there may have been an injury by accident caused to the workman. But it does not establish that the accident was one "arising out of the employment." It is in these words that the stress of the case mainly lies, as Mr. Simon in one passage of his argument partially indicated. When the man's condition was such that he might have died in his sleep, and the mere tightening the nut with no more strain than ordinary in such work caused the accident, can it be said that the accident was one "arising out of" the employment? That seems to me to be the crucial point.

I do not think we should attach any importance to the fact that there was no strain or exertion out of the ordinary. It is found by the county court judge that the strain in fact caused the rupture, meaning, no doubt, that if it had not been for the strain the rupture would not have occurred when it did. If the degree of exertion beyond what is usual had to be considered in these cases, there must be some standard of exertion, varying in

every trade. Nor do I think we should attach any importance to the fact that this man's health was as described. If the state of his health had to be considered, there must be some standard of health, varying, I suppose, with men of different ages. An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of health.

It may be said, and was said, that if the Act admits of a claim in the present case, every one whose disease kills him while he is at work will be entitled to compensation. I do not think so, and for this reason. It may be that the work has not, as a matter of substance, contributed to the accident, though in fact the accident happened while he was working. In each case the arbitrator ought to consider whether in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone or from the disease and employment taken together, looking at it broadly? Looking at it broadly, I say, and free from over-nice conjectures, was it the disease that did it, or did the work he was doing help in any material degree?

In the present case I might have come to a different conclusion on the facts had I been arbitrator, but I am bound by the finding, if there was evidence to support it. It is found that the strain contributed to the death. There was evidence on which the learned judge was entitled so to find, as I respectfully think, and I therefore advise your Lordships to affirm the order of the Court of Appeal.

LORD MACNAGHTEN. My Lords, in this case your Lordships have heard a very able and ingenious argument upon the construction of the 1st section of the Workmen's Compensation Acts. I need hardly say that it is not from any want of respect to the learned counsel who advanced it that I pass that argument by. It has been disposed of already. It was advanced and rejected in the case of *Fenton v. Thorley*. (1) There the Court

H. L. (E.)

1910

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CLOVER,
CLAYTON
& Co.,
LIMITED
v.
HUGHES.

Lord Loreburn
L.C.
—

(1) [1903] A. C. 443.

H. L. (E.)

1910

CLOVER,
CLAYTON
& CO.,
LIMITED

v.

HUGHES.

Lord
Macnaghten.

of Appeal had held that if a man meets with a mishap in doing the very thing he means to do the occurrence cannot be called an accident. There must be, it was said, an accident and an injury: you are not to confuse the injury with the accident. Your Lordships' judgment, however, swept away these niceties of subtle disquisition and the endless perplexities of causation. It was held that "injury by accident" meant nothing more than "accidental injury" or "accident," as the word is popularly used. It is not perhaps quite accurate to say that in that case a definition of the term "accident" was hazarded. It would be more correct to say that the decision was that the word "accident" was to be taken in its ordinary and popular sense. Some of the noble and learned Lords who gave judgment explained what they understood to be the ordinary meaning of the word, and I cannot but think that the explanations given, varying slightly in expression, are substantially correct.

In the argument in *Fenton v. Thorley* (1) many decided cases were cited in which the word "accident" was considered. There is one which was cited in the argument, but not noticed in the judgment, which is, I think, a very good example of the far-reaching application of the word. I may perhaps be permitted to refer to it. It is not the less instructive because it occurred before the Workmen's Compensation Act of 1897. The case was this: A railway company had established a system of insurance for the benefit of their servants who contributed to it. One of their servants—a signalman in his signal-box—saw a train coming, and noticed that there was something wrong with one of the carriages. He was much alarmed and waved his flag frantically. The engine-driver saw the signal, the train was stopped, and an imminent disaster was averted. But the signalman was so horrified that he lost his nerve and was incapacitated for work. Was that an accident? The condition of the insurance was "absolute for all accidents, however caused, occurring to the insured in the fair and ordinary discharge of his duty." The Court of Appeal, consisting of Lord Esher and Kay and A. L. Smith L.JJ., held unanimously that the plaintiff had been incapacitated by accident within the meaning of the policy.

(1) [1903] A. C. 443.

"The sole question," said A. L. Smith L.J., "is whether the facts which have been proved constitute an injury to the assured by an accident within the meaning of the policy This is not a case in which, as it has been suggested, the plaintiff has only suffered mental pain or grief. If that had been so it would not have been within this policy; but this is a case in which he has been subjected to such a shock to his nerves that he has become physically prostrated and put out of employment for months. The company has undertaken to pay the assured the weekly allowance of 1*l.* in case of his being incapacitated for employment by reason of an accident, however caused. That I read to mean any unforeseen circumstance, however caused, occurring to him in the discharge of his duty in the company's service It may be that this sort of accident was not thought of when the policy was framed, for it is of rare occurrence, but that does not prevent its coming within the terms of the policy": *Pugh v. London, Brighton, and South Coast Ry. Co.* (1)

Now, in the present case, I have no doubt that there was an accident in the popular sense of the word. The man ruptured an aneurism in his aorta. An aneurism, as I understand it, is an unnatural or abnormal dilatation of an artery; but still it is a part of the artery, and so a part of the man's body. The man "broke part of his body," to borrow Lord Robertson's expression in *Brintons v. Turvey* (2), and he certainly did not mean to do it.

That the accident, if it was an accident, occurred in the course of the man's employment cannot be disputed. He was at his ordinary work at the time.

The real question, as it seems to me, is this: Did it arise out of his employment? On this point the evidence before the county court judge was undoubtedly conflicting. But he has held that it did, and I think there was sufficient evidence to support that finding, though I do not say I should have come to the same conclusion myself. "The death," the learned judge says, "was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal." The fact that the man's

H. L. (E.)

1910

CLOVER,
CLAYTON
& CO.,
LIMITED
v.
HUGHES.

Lord
Macnaghten.

(1) [1896] 2 Q. B. 248.

(2) [1905] A. C. 230.

H. L. (E.)

1910

CLOVER,
CLAYTON
& Co.,
LIMITED

v.

HUGHES.

Lord
Macnaghten.

condition predisposed him to such an accident seems to me to be immaterial. The work was ordinary work, but it was too heavy for him. It must be taken on the finding of the learned county court judge that the accident was unexpected by the workman. It can hardly be supposed that he intended to kill himself. The fact that the result would have been expected, or indeed contemplated as a certainty, by a medical man of ordinary skill if he had diagnosed the case is, I think, nothing to the purpose. An occurrence I think is unexpected if it is not expected by the man who suffers by it, even though every man of common sense who knew the circumstances would think it certain to happen. All accidents, I suppose, may be divided into two classes; those which are due to one's own fault, and those which are not. Accidents due to a man's own fault are for the most part the result either of inadvertence or miscalculation. If a man miscalculates his powers and so fails in what he attempts to do and, it may be, injures himself, he has probably plenty of friends who will tell him (at any rate after the event) that they knew exactly what would happen. But still, as it seems to me, the untoward occurrence would popularly be called an accident.

I am of opinion that the judgment appealed from is right, and that the appeal must be dismissed with costs.

LORD ATKINSON. My Lords, I regret that I am unable to concur with the judgments which have been delivered. I think the meaning put upon the word "accident" in *Fenton v. Thorley* (1) must now be accepted in all cases turning on the construction of the phrase "injury by accident" used in the Workmen's Compensation Act, 1906, as its true meaning, namely, "an unlooked for mishap or an untoward event which is not expected or designed." It must exclude disease. What is "unlooked for" or "unexpected" must, in every case, exist either in the external influences to which the sufferer is subjected, or in the effect upon him which those influences produce. I assume, for the purposes of this case, it would be sufficient if they existed in the effect produced, though that may be, according to Mr. Simon's argument, to confound the injury with the accident.

(1) [1903] A. C. 443.

If the external conditions which surround and the external influences which act upon a workman at the time he receives an injury be the normal conditions and influences which would surround and act upon any one engaged in the discharge of the normal duties of employment such as his, it could not, I think, be contended that anything "unlooked for" or "unexpected" had come to pass in those conditions and influences. And if the physical state of the workman be such that those acquainted with it, and capable of forming an intelligent opinion upon the effect which those influences would, under such conditions, produce upon him, regard the injury as the certain or highly probable consequence of their action, I fail to see how the injury could be regarded as an accident.

In my view there was no evidence before the county court judge to shew that, having regard to the duties which the deceased was employed to discharge, there was anything whatever abnormal, unexpected, or unlooked for in the external conditions which surrounded him or in the external influences to which he was subjected at the time of his death. I think the findings of the county court judge amount to a finding to this effect. He says: "I have come to the conclusion that the strain put upon the deceased by the exertion of tightening the nut with the spanner caused the rupture. There was no evidence from which I could draw any exact conclusion as to the extent of strain that was being put on the deceased at the time, but it was at all events not more than ordinary in such work; but the evidence satisfied me that such strain was sufficient to bring about the rupture of the aneurism, having regard to the man's condition at the time. And I find that, as a fact, the rupture was so brought about."

This ordinary strain, however, was too much for the deceased; but why? Because he was suffering from a most dangerous disease—aneurism of the aorta. The disease was in a stage so advanced that it might terminate fatally even when he was in his bed asleep and perfectly quiescent. On the same page is to be found the following passage in the judgment of the county court judge: "On a post-mortem examination it was found that there had existed a very large aneurism of the aorta, and death was

H. L. (E.)

1910

CLOVER,
CLAYTON
& CO.,
LIMITED
v.
HUGHES.

Lord Atkinson.
—

H. L. (E.)

1910

CLOVER,
CLAYTON
& CO.,
LIMITED

v.

HUGHES.

Lord Atkinson.

attributed to the rupture of the aorta. The aneurism was in such an advanced condition that it might have burst while the man was asleep, and very slight exertion or strain would have been sufficient to bring about a rupture."

The medical evidence is very strong and fully supports the summing up. Dr. Winter says: "There was a very large aneurism of the aorta, that is a dilation of the aorta, which is the largest artery that feeds the heart. This was ruptured. This caused his death . . . I think the rupture was brought about by some strain or slip. Extra muscular strain might cause it. I think the pulling of the nut might cause a strain which would cause death"; but on cross-examination he said, "The aneurism was in an advanced condition. The man might have died in his sleep. I think the pressure on the nut would accelerate the rupture of the aneurism. I think this was the natural cause. . . . I say the third turn on the nut is sufficient to produce the strain."

Dr. Glynn says: "In my view the aneurism very probably ruptured during the slight strain the man applied when screwing the nut. . . . He might have gone on for a few weeks longer. The fact that he had just returned from dinner would render rupture more likely to occur." And on cross-examination he admits, "The man might have died in his sleep or walking to his work. From extra force needed." That is, I presume, from the extra force needed to walk to his work.

The expert, Dr. Owen, expressed the opinion that the exertion the deceased was undergoing "contributed to the rupture of the aneurism" and that "*muscular exertion is usually the immediate cause of the rupture of an aneurism.*"

That appears to me merely to amount to this, that the disease was so far advanced that the rupture might happen from natural causes, even when the deceased was asleep and quiescent, but that muscular exertion, even so slight as that involved in walking, might accelerate the fatal end, and that the slight exertion of turning the nut did, in the opinion of the doctor, in fact accelerate it in this case. Now, what was the nature of this slight exertion? It was normal in deceased's employment. It was not sudden. It was not severe. It was neither unexpected nor

unlooked for. On the contrary it was the very exertion which he was employed to make and it was contemplated that he should make. Connell, the fellow workman of the deceased, stated: "We were making a condenser bath. We were putting nuts on the bolts by which the sides were held together. The sides had to be screwed tightly together." . . . "I held the washer while he put on the nut, and screwed it up with his fingers; then he tightened it with a spanner. He had taken about two turns of the spanner. He was about to take another." He then goes on to describe the supposed slip, which, if it ever occurred, was not thought to have caused the deceased's death. The spanner, he said, "would be about eighteen or twenty inches long." On being re-examined, he said the deceased "had only put nuts on two bolts before. He had done no heavy work before in the morning." "It" (I presume the nut) "might only take six turns"—that is, I presume, six turns to screw it up tight. Only two were in fact given. The time when a severe strain was required had plainly not arrived.

That was the applicant's case. The evidence given on her behalf leads, in my view, irresistibly to the conclusion that, having regard to the condition of the deceased, the rupture of this aneurism and his subsequent sudden death were in the nature of things as certain, or if not certain as extremely probable, a consequence of the exertion necessary in the ordinary performance of his work as anything could well be, and I think no reasonable man could come to any other conclusion.

For the respondents, Dr. Verral, who assisted at the post-mortem with Dr. Winter, the applicant's witness, was examined, and stated that "the walls were thin and liable to go at any moment. There was a rupture in the aneurism." In my opinion, having regard to these facts, death might have occurred without any exertion at all; and on cross-examination he states, "I could not say one way or another that his work had nothing to do with it. He might have died without it. His aneurism had a very thin wall, likely to break at any time, and more likely to burst at the time of exertion. He was in such a condition that a very slight muscular exertion might bring about the rupture. He ought to have been in bed and not at work."

H. L. (E.)

1910

CLOVER,
CLAYTON
& CO.,
LIMITED
v.
HUGHES.

—
Lord Atkinson.
—

H. L. (E.) And again, "he might have gone off without working. It is very probable he might. I would not swear that his rupture had nothing to do with his work." And on re-examination he said, "A serious heavy job would have led me to infer that it was due to the work, but the work was of such a nature in this case that I cannot infer one way or the other." Two experts, namely, Mr. Keith Montserrat and Professor Buchanan, corroborated this witness and Dr. Verral.

1910
CLOVER,
CLAYTON
& Co.,
LIMITED
v.
HUGHES.
Lord Atkinson.

The only two conclusions to which I think any reasonable man could come on that evidence are (1.) that the natural termination of the disease, rupture, was reached unaffected by the work deceased was doing, or (2.) that the work accelerated that termination. The strain was very slight. It could scarcely be slighter, if he was to do any work at all. The rupture was, as I have said, the certain or highly probable result of the slightest muscular exertion. It may not have been looked for or expected by the deceased, his employers, or his fellow workmen. There is no evidence that he or they knew or suspected what his condition was, but the ignorance of such people on this point cannot turn, I think, the inevitable or highly probable result of a disease or hidden condition of body into an "accident." Neither can, in my opinion, the fact that the final catastrophe consisted in the rupture of a tissue, if that catastrophe be known to be the certain or highly probable result of the malady.

In order that the "mishap" should be "unlooked for" or the event "be unexpected," so as to make an injury "an injury by accident" within the meaning of this Act, the mishap must, I think, be "unlooked for" or the "event" be "unexpected" by some person with knowledge of the facts and capable of judging reasonably of them.

The death of the deceased was, it appears to me, no more an accident than if, had he been a butler, he had died walking slowly up the stairs of the house in which he served, or, had he been a coachman, he had died while slowly mounting to his box. It may possibly be that it would be better, in the interest of workmen, that they should be entitled to compensation for all injuries which arise out of and in the course of their employment

however caused, though that is far from clear, since it might result in depriving of employment all who were in any way unsound or past their prime; but while the word "accident" remains in the statute, force and meaning must be given to it in construing the statute, and, much as one must sympathize with the claimant, I for my part am unable to see that anything which was not normal and most probable, if not certain, befell the deceased. I therefore think that there was no evidence upon which the county court judge, as a reasonable man, could legitimately find as he has found, and that the appeal should be allowed.

H. L. (E.)

1910

—
CLOVER,
CLAYTON
& CO.,
LIMITED
v.
HUGHES.

Lord Atkinson.

LORD COLLINS. My Lords, I am of opinion that this appeal must be dismissed. I agree with the Court of Appeal that the case is concluded by the authority of *Fenton v. Thorley*. (1) In fact, the argument for the appellant was substantially that which prevailed in the Court of Appeal in a series of cases which were overruled by that decision. One of those specially commented upon by Lord Macnaghten, *Hensey v. White* (2), was, in essentials, identical with this case. The workman, who was in an unsound physical condition, ruptured himself in attempting to turn a wheel, which proved too stiff for his physical powers. A post-mortem examination disclosed the fact that he had been suffering from chronic inflammation and congestion of the intestines, and to this, as the antecedent cause, one of the medical witnesses attributed the fatal result of the strain. The county court judge had found as a fact that the death was the result of chronic disease, and held "that something beyond the mere fact that a long-standing disease had suddenly assumed a fatal form, in consequence of the deceased doing his ordinary hard work in the usual way, was necessary in order to constitute an accident within the meaning of the Act." The Court of Appeal had affirmed this view.

Lord Macnaghten, in overruling this and a group of other cases decided on the same lines by the Court of Appeal, says (3): "If a man, in lifting a weight or trying to move something not easily moved, were to strain a muscle, or rick his

(1) [1903] A. C. 443.

(2) [1900] 1 Q. B. 481.

(3) [1903] A. C. at p. 446.

H. L. (E.) back, or rupture himself, the mishap, in ordinary parlance, would be described as an accident. Anybody would say that the man had met with an accident in lifting a weight or trying to move something too heavy for him." He then goes on to express his entire agreement with the case of *Stewart v. Wilsons and Clyde Coal Co., Ltd.* (1), and singles out for special approval a passage in the judgment of Lord M'Laren: "If a workman, in the reasonable performance of his duties, sustains a physiological injury as the result of the work he is engaged in . . . this is accidental injury in the sense of the statute." Lord Lindley likewise expresses his approval of the same decision.

1910
CLOVER,
CLAYTON
& Co.,
LIMITED
v.
HUGHES.
Lord Collins.

In view of these authorities, I cannot see that the Court of Appeal had any option to decide otherwise than it did in the present case.

LORD SHAW OF DUNFERMLINE. My Lords, in *Coe v. Fife Coal Co.* (2), to which I shall afterwards more particularly refer, Lord President Dunedin used this language: "I confess frankly that I have found the case to be one of great delicacy and difficulty, because it is one of those cases, with which one is not unfamiliar in the law, where one seems almost driven by the course of decisions, each of which gradually goes a little farther than the one which preceded it, until at last you reach a point which, when the first decision was given, was probably not contemplated." These words, in which I entirely concur, aptly express my own situation in this case. When one has so to interpret an Act of Parliament as to put an interpretation upon interpretations of it, there is much danger of being landed very far away from the meaning of the statute itself; that danger in the present case is very real, and it is not lessened by the wish and necessity to accept with complete loyalty the decisions of your Lordships' House.

The evidence as to the unfortunate man's condition is thus stated by the county court judge: "On a post-mortem examination it was found that there had existed a very large aneurism of the aorta, and death was attributed to rupture of the aorta. The aneurism was in such an advanced condition that it

(1) 5 F. 120.

(2) (1909) S. C. 393.

might have burst while the man was asleep, and very slight exertion or strain would have been sufficient to bring about a rupture."

The man was engaged in tightening a nut with a spanner. As to "strain" in doing so, the judge says: "It was at all events not more than ordinary in such work, but the evidence satisfies me that such strain was sufficient to bring about the rupture of the aneurism, having regard to the man's condition at the time, and I find as a fact that the rupture was so brought about. In this case the death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal." Apart from the facts so stated, the formal finding that the deceased died from injury caused by accident arising out of and in the course of employment is clearly dependent upon the law, and it is pronounced by him, as the learned judge very properly states, "having regard to the general trend of the cases." It is this and this alone which has been treated as a determinate conclusion in fact and fact alone. I must respectfully decline to accept it in that sense.

Apart from these cases, my Lords, and on these facts, I am of opinion that this workman did not die owing to injury by accident, but died of heart disease. There was nothing unusual or abnormal in the work, no strain "more than ordinary" was imposed or involved, no occurrence took place to intercept or even disturb the work or the workman; all that can be said is that, being at work, and diseased, he died. His death was caused, in my view, not by any injury by accident, but simply by the disease under which he unhappily suffered. That, my Lords, is my opinion on the facts, apart from the decisions; and having considered the latter with much anxiety and respect, and recognizing to the full the delicacy of some of the distinctions drawn, I am confirmed in the opinion that neither in language nor intention does the Workmen's Compensation Act, 1906, apply to this case.

Your Lordships' House has, after considering the various decisions in lower Courts, made three important pronouncements on this branch of the law. Remembering that the present

H. L. (E.)

1910

—
CLOVER,
CLAYTON
& Co.,
LIMITED
v.
HUGHES.

—
Lord Shaw of
Dunfermline.
—

H. L. (E.)

1910

~
 CLOVER,
 CLAYTON
 & CO.,
 LIMITED
 v.
 HUGHES.

Lord Shaw of
 Dunfermline.

case is one of the employee carrying about with him, so to speak, a fatal disease, I turn to see how far such a case is governed by these authorities. In *Fenton v. Thorley* (1) "a workman, employed to turn the wheel of a machine, ruptured himself," and it was held that compensation under the Act was due. So far as the condition of the workman was concerned, my Lords, nothing more differing from the facts in this case, could be stated, because, as my noble and learned friend Lord Macnaghten points out, "Fenton was a man of ordinary health and strength." But the unexpected, totally unexpected, had happened, and Lord Macnaghten came to the conclusion that "the expression 'accident' is used in the popular and ordinary sense of the word, as denoting an unlooked for mishap or an untoward event which is not expected or designed." By anticipation Lord Macnaghten had warned commentators against making too wide a use of even this definition, and, in my opinion, he closely touched circumstances like the present when he said "the words 'by accident' are, I think, introduced parenthetically, as it were, to qualify the word 'injury,' confining it to a certain class of injuries, and excluding other classes, as, for instance, injuries by disease or injuries self-inflicted by design."

The other learned judges all proceed on the view, and Lord Robertson expressly says, that the workman was a person of ordinary strength, while Lord Lindley also holds that there was an accident in the external sense, that "the machine was accidentally put out of order," had been stopped by an "accident," and he adds, "it is not necessary to consider whether the Act applies to cases in which the cause of the injury is not known, or in which the only unforeseen occurrence is the personal injury itself." It is sufficient to say of that case that the issue of disease, as alternative to accident, was not being there dealt with or decided. But, if isolated passages are permissible, these would seem very clearly to shew that a case of disease, like the present, was expressly treated as differentiated from that of *Fenton* and excluded from the Act.

I observe that in *Fenton's Case* (1) and also in *Ismay's Case* (2) a citation was made, as it has been made to-day, of a sentence

(1) [1903] A. C. 443.

(2) [1908] A. C. 437.

from the judgment of Lord M'Laren in *Stewart v. Wilsons and Clyde Coal Co.* (1) to the following effect: "If a workman, in the reasonable performance of his duties, sustains a physiological injury, as the result of the work he is engaged in, I consider that this is accidental injury in the sense of the statute."

H. L. (E.)

1910

CLOVER,
CLAYTON
& CO.,
LIMITED

v.

HUGHES.

Lord Shaw of
Dunfermline.

My Lords, I respectfully ask, to what argument were these observations directed? I do so because Lord M'Laren himself says expressly that his "observations will be confined to one point." The point was this, that it was argued that "an accident implied some agency external to the injured person." In displacing such a limitation of the statute (namely, to "some external and visible or palpable cause, e.g., the breakdown of machinery") the learned judge makes use of the observation so often quoted for much wider purposes, and the illustrations he gives shew most clearly on what single point he was remarking, e.g., "the case of a railway servant engaged in shunting operations and crushed between two carriages without detriment to the carriages. Another illustration is the case of a man whose hand is crushed between wheels or rollers without any damage resulting to the machinery." These illustrations shew, in my humble judgment, the extreme danger of using his concluding proposition as meant to cover an issue such as the present, namely, as between accident and pre-existing disease.

That issue the next case, namely, *Brintons v. Turvey* (2), approaches but does not reach. A workman sorting wool was infected by the bacillus of anthrax passing from the wool into his eye. The mischief was held to be clearly due to accident, or, as Lord Macnaghten put it, to a chapter of accidents; these caused the injury by setting up the disease to which the workman succumbed. There was no case whatsoever of the man having proceeded to work while already labouring under disease having its origin quite distinct, as here, from his work, nor any case even of acceleration of the effects of pre-existing disease. So that one can hardly regard the case as bearing upon the issue now before the House.

It was maintained that this case, however, was in truth and

(1) 5 F. 120.

(2) [1905] A. C. 230.

H. L. (E.)

1910

CLOVER,
CLAYTON
& Co.,
LIMITED
v.
HUGHES.

Lord Shaw of
Dunfermline.

substance governed by *Ismay, Imrie & Co. v. Williamson*. (1) I have carefully and respectfully examined that decision. What had happened was that a workman, in a weak and emaciated condition, while raking out ashes from under the boiler in the stokehole of a steamship, received a heat stroke, from the effect of which he died. On the point as to whether the man died from accident the Lord Chancellor says: "What killed him was a heat stroke coming suddenly and unexpectedly upon him while at work. Such a stroke is an unusual effect of a known cause, often no doubt threatened, but generally averted by precautions, which experience in this instance had not taught." How unlooked for, how unexpected, the thing was appears from the facts, as reported, that "the doctor in a long experience had only known of four cases, and the engineer of only one." My Lords, when I am asked to affirm from a case so very special as that that a general rule should be deduced to the effect that, if in the normal circumstances of normal work a diseased workman dies, the death is to be attributed to accident, I reply that I cannot do it. Further, I do not think it was meant to be so applied. As I have shewn, the judgment of this House in *Fenton's Case* (2) leans distinctly the opposite way.

Lord Macnaghten, who delivered the leading judgment in *Fenton v. Thorley* (2), dissents from the conclusion of the Lord Chancellor and Lord Ashbourne in *Ismay's Case*. (1) But the Lord Chancellor in *Ismay's Case* (1) expressly lends the weight of his authority to the decision of the House in *Fenton's Case*. (2) Lord Ashbourne dwells on the unlooked for and unexpected nature of the occurrence, founds on Lord M'Laren's dictum to which I have referred, and distinctly reserves the general case when he observes, "I do not at all say that all diseases arising out of or in the course of employment should be regarded as a personal injury by accident."

My Lords, I am glad to be confirmed in the opinion I have formed by the decision of the Court of Session in *Coe v. Fife Coal Co.* (3), and in particular by the analysis of the three decisions of this House just referred to, made by that most experienced

(1) [1908] A. C. 437.

(2) [1903] A. C. 443.

(3) (1909) S. C. 393.

judge Lord Kinnear. In *Coe's Case* (1) "the cause of appellant's incapacity for work was cardiac breakdown, due to the fact that the work in which he had been engaged was too heavy for him." It was held that the death could not be attributed to injury by accident. Dealing with the argument—also strongly pressed in this case—that the event was accident if "unexpected," "unlooked for," "unintended," &c., Lord Kinnear uses language as follows, which I very respectfully adopt: "It seems to me that all these interpretations of the word point to some particular event or occurrence which may happen at an ascertainable time, and which is to be distinguished from the necessary and ordinary effect upon a man's constitution of the work in which he is engaged day by day. So defined, the word 'accident' seems to me to exclude the anticipated and necessary consequence of continuous labour." The present, my Lords, is, in my opinion, exactly such a case.

My Lords, where disease is a result brought about by the employment itself—such as that of lead-workers—those cases are specially and separately dealt with as diseases; and what I may call liability on the employment is imposed. Nothing could more clearly indicate that in the passing of this Act Parliament did not mean, at least in the ordinary case, to include such cases within the category of accidents. In my opinion, in the present case it is impossible for me to attribute this unfortunate and afflicted workman's death to injury by accident, as such a pronouncement, however prompted by compassion for those bereaved, would be erroneous in fact and involve a liability which is not imposed either by the language or in the intention of the statute. Nor do I think it altogether without a bearing on the sound construction of the statute, that if a different interpretation be put upon the words cited, then a new peril will have been introduced into the lives of many workers who, notwithstanding debility and chronic disease, are most anxious and willing to devote their remaining powers to earning an independent livelihood. Should such persons be held to carry with them into and upon employment the serious additional liability alluded to, employment may become for such persons, often the

H. L. (E.)

1910

CLOVER,
CLAYTON
& Co.,
LIMITED

v.

HUGHES.

Lord Shaw of
Dunfermline.

H. L. (E.) most needy and deserving of the population, more difficult to obtain.
1910

CLOVER,
CLAYTON
& Co.,
LIMITED
v.
HUGHES.

I accordingly tender my dissent from the conclusions reached by the majority of your Lordships.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 14, 1910.

Solicitors: *Barlow, Barlow & Lyde, for J. H. Glover, Liverpool; Helder, Roberts, Walton & Giles, for J. A. Behn, Liverpool.*

[HOUSE OF LORDS.]

H. L. (E.) LECOUTURIER AND OTHERS APPELLANTS;
1910
March 18. REY AND ANOTHER AND
RESPONDENTS.
LECOUTURIER AND OTHERS APPELLANTS;
AND
REY AND OTHERS RESPONDENTS.

Trade Mark—Passing off—"Chartreuse"—French Law of Associations—Vesting of French Business under French Judgment—Effect of French Law upon Property in English Trade Marks—Rectification of Register.

Where a foreign manufacture has acquired a reputation in England it is beyond the power of a foreign Court or foreign legislature to prevent the manufacturers from availing themselves in England of the benefit of that reputation or to extend or communicate the benefit to any rival or competitor in the English market.

Decision of the Court of Appeal, [1908] 2 Ch. 715, affirmed.

THE circumstances of these two appeals are stated in the judgment of Lord Macnaghten.

The Court of Appeal held that the Carthusian monks were entitled (1.) to use their old trade marks in England and to have certain entries expunged from the register of trade marks

in England; and (2.) to an injunction restraining the appellants from (inter alia) using the word "Chartreuse" in connection with their liqueurs, and from selling their liqueurs in England, without distinguishing their liqueurs from the liqueurs manufactured by the monks. Hence the present appeals.

H. L. (E.)

1910

LECOUR-
TURIER
v.
REY.

Feb. 2, 3. *Sir Robert Finlay, K.C., and Upjohn, K.C.* (*L. B. Sebastian* with them), for the appellants.

P. O. Lawrence, K.C. (*Younger, K.C., and Sargant* with him), for the respondents.

Sir W. S. Robson, A.-G., and Austen-Cartmell, for the Comptroller of Trade Marks.

Upjohn, K.C., in reply.

The House took time for consideration.

March 18. LORD MACNAGHTEN. My Lords, your Lordships, I think, are all agreed in holding that the decision of the Court of Appeal in both these cases is perfectly right.

The facts are not in dispute. The principle of law on which the respondents, who were plaintiffs in the action, rely is well settled. It has been recognized and asserted over and over again in this House. There is no feature of novelty about the case, unless one is to be found in the circumstances which led immediately to this litigation.

A religious community of great antiquity, known as the Order of Carthusian Monks, had, until lately, its principal seat and its headquarters near the Dauphiné Alps, not far from Grenoble, in the department of Isère in France, at a monastery known as "La Grande Chartreuse." There was the residence of the prior-general of the order, and there was manufactured, according to a secret process, a liqueur of several sorts and colours known all over the world as "Chartreuse." To this trade name and to the insignia by which they designated their manufacture the monks had vindicated their exclusive right in many lawsuits in England, and they possessed several trade marks on the English register standing in the name of their procurator, Abbé Rey.

In 1901 there was passed in France a law called the Law of

Since The Dreyfus Case

H. L. (E.)

1910

LECOU-

TURIER

v.

REY

Lord
Maenaghten.

Associations, which declared illegal all unlicensed religious associations failing to obtain within a limited period authorization from the State. The monks of La Grande Chartreuse applied for the requisite authorization, but they did not succeed in obtaining it. Thereupon, in due course, the monastery of La Grande Chartreuse, with its dependencies in France, was dissolved. The monks were forcibly expelled from the country, and all their property in France, including their distillery and their French trade marks, was confiscated and sold. The particulars of sale purported to comprise the commercial business of the monks and "the customers and goodwill attached to the business." But two things that belonged to them—the secret of their manufacturing process and the reputation which their liqueurs had acquired in foreign countries, and notably in England—were incapable of being seized or confiscated. Expelled from France and exiled from their old home, the monks of La Grande Chartreuse carried with them the secret of their manufacture and the power of securing the benefit of the reputation which their skill had gained for them abroad.

After their expulsion from France the monks of La Grande Chartreuse transferred the headquarters of their order to Lucca, in Italy, but they set up their business in Tarragona, in Spain. There, having made an arrangement with the respondents La Union Agricola for the disposal of their output for a term of years, they began to make their liqueurs in the old way according to their old and secret process. The secret was jealously guarded, and the manufacture was carried on throughout the whole process by the monks themselves. The liqueurs so made bore the insignia of the Carthusian Order and the old trade marks and labels, the only difference being a note to the effect that the liqueurs were now made at Tarragona.

Then followed a warfare in England waged with varying success. On the one hand were the monks and La Union Agricola, on the other M. Lecouturier, the liquidator appointed by the French Court to wind up the affairs of the dissolved monastery, and with the liquidator were the purchasers from him, calling themselves La Compagnie Fermière de la Grande Chartreuse. The monks fought to preserve the remnant of their

property which was beyond the reach of French law. The liquidator and the purchasers from him, who were not in possession of the monks' secret, strove to supplant them in the English market by adopting their insignia and representing that they were the proprietors of the "genuine" liqueur, "the old and world-renowned liqueur 'Chartreuse.'"

At the outset the monks were victorious. On the strength of the trade marks, registered in the name of their procurator, they stopped the importation into England of goods bearing their insignia and got up so as to represent or counterfeit their manufacture. Then by a contrivance, which it is difficult to reconcile with the actual truth, the liquidator procured the English trade marks to be transferred to him, on the allegation that he was the assignee of Abbé Rey. This manœuvre turned the scale in favour of the appellants, and the monks in their turn were prevented from using their old trade marks in England. The monks then brought this suit, and, at the same time, moved to expunge the last entry from the register of trade marks. The Court of Appeal has decided in their favour, and the liquidator and the purchasers from him are now the appellants.

The only plausible ground of appeal urged at the Bar was that under French law and by reason of their purchase from the liquidator the appellants were justified in doing what they have done. To me it seems perfectly plain that it must be beyond the power of any foreign Court or any foreign legislature to prevent the monks from availing themselves in England of the benefit of the reputation which the liqueurs of their manufacture have acquired here or to extend or communicate the benefit of that reputation to any rival or competitor in the English market. But it is certainly satisfactory to learn from the evidence of experts in French law that the Law of Associations is a penal law—a law of police and order—and is not considered to have any extra-territorial effect. It is also satisfactory to find that these legal experts confirm the conclusion which any lawyer would draw from a perusal of the French judgments in evidence in this case, that the sale by the liquidator of the property bought by the appellant company has not carried with it the English trade marks, or established the claim

H. L. (E.)

1910

LECOU-

TURIER

v.

REY.

Lord
Macnaghten.

H. L. (E.) of the appellant company to represent their manufacture as the
1910 manufacture of the monks of La Grande Chartreuse, which most
LECOU- certainly it is not.

TURIER
v.
REY.

I think both appeals must be dismissed with costs.

LORDS ATKINSON AND COLLINS concurred.

LORD SHAW OF DUNFERMLINE. My Lords, the appellant M. Henri Lecouturier, in his statement of defence, sets forth that he "is a French judicial officer, and in all his acts complained of in this action he has acted under the directions of the French Courts having competent jurisdiction, and in accordance with decisions given by them for the purpose of carrying into effect the enactments of the Legislature of the French Republic." He has, it is added, no personal interest in the matter. M. Lecouturier has sold the liqueur business in France with the trade marks in England to the Compagnie Fermière de la Grande Chartreuse, which company joins with him in his defence. The other defendants are his agents in this country.

The plaintiff and respondent Célestin Marius Rey was for many years the procurator of the Carthusian Order of Monks, residing at the monastery of La Grande Chartreuse, near Grenoble in France. Herbault, the other plaintiff and respondent, is the general superior. They sue this action on behalf of themselves and all the other members of the Carthusian Order. That order is a religious society founded in the eleventh century, and it is said to hold, or to have held, property in various countries, including France and England. Part of that property consists of the monastery of La Grande Chartreuse. It is maintained that the order is in possession of a secret process or recipe for the manufacture of the liqueurs called "Chartreuse," and it is not disputed that the business of manufacture has been conducted by the monks in that locality, that a trade of a profitable nature and of large dimensions has been built up in these articles, and that sales thereof have been conducted for many years past, not in France alone, but in other countries of the world. In some of these countries trade marks for

the liqueurs have been obtained. One of these countries is England. H. L. (E.)

One of the chief points to be settled in this case is as to the effect of a law passed by the Legislature of the French Republic on July 1, 1901, and amended on December 4, 1902. A translation of this with certain brief supplements appears among the papers, as also a translation of decrees of August 16, 1901, by Monsieur Loubet, French Minister of the Interior, made pursuant to articles 18 and 20 of the law of July 1. My Lords, the law and decrees cannot be perused without a consciousness of the importance of the subject-matter with which they deal, touching, as they do, at various points the structure and development of French society, and affecting its law and the property of French subjects in much detail. My Lords, the "comity of nations" is an expression which is familiar but necessarily indefinite. The attempts to fix it down into a set of rules of legal or binding effect, and the discussions which have accompanied such attempts, have been very fruitless. But (bearing in mind that we are dealing in the present case with the relations of French citizens, and a business whose centre was, and whose conduct was mainly, in France) I take it at least that that comity tends towards encouraging the co-operation of civilized communities by giving effect, so far as may be, to the regulation by the Legislature and Courts of the domicile of the parties of the relations and rights of these parties. Such regulations should, upon all suitable occasions, be treated with most favourable regard and with the desire to respect and apply the principles from which, so to speak, the central propositions emanate, so far as these can be accommodated to the practice and requirements of foreign judicatures. Nothing, my Lords, in the slightest degree inconsistent with this appears in the judgments of the Court below, and I proceed further to say that I think it would be, so far as I can see, not acting in accordance with the true meaning and effect of the French Legislature and decrees, but acting contrary to that meaning and effect, to give them the application beyond the territory of the French Republic which is desired in this case.

Throughout all the legislation as to the necessity for

1910

LECOU-
TURIER

v.

REY.

Lord Shaw of
Dunfermline.

H. L. (E.)

1910

LECOU-
TURIER

v.

REY.

Lord Shaw of
Dunfermline.

associations being sanctioned after application by the Government, as to no religious congregations being formed (article 13) "without an authorization given by a law which will determine the conditions of its working," as to the ipso facto dissolution of congregations not so authorized, and as to the sequestration of the effects and the appointment of an administrator and liquidator, and particularly throughout the regulations as to the conduct of the liquidator, the Court to which he is answerable, and the realization and distribution of property ingathered by him, I cannot trace anything, either express or implied, which suggests extra-territorial operation. And beyond the regulation of property within France as part of a scheme for dealing with a question reckoned to be of great social import in that country, I do not discern any intention, either express or implied, by the legislation or decrees to effect the transfer or affect the holding of property in other countries to which the social and political problems, as French problems, did not extend. In short, and to take the present case as an instance, I do not see anything conferring upon the liquidator of the property of the Carthusian Order a right to strip that order of their possessions in all parts of the world. I do not think that what the French Legislature did can be read in this extreme sense. Whether effect would have been given by foreign Courts to such legislation is therefore a question which does not really arise.

The species of property which the defendants maintain are embraced within that committed to the appellant by his appointment of liquidator of the effects of the Carthusian Order are certain trade marks registered in England. He has produced before the Registrar of Trade Marks the decree of his appointment, and caused an application to be made at the British Patent Office for the entry of his name in the British register of trade marks, as the subsequent proprietor of the trade marks registered there on behalf of the said dissolved congregations (all of which referred to the Grande Chartreuse), and such entry was made on May 2, 1905. It is, of course, admitted that the formality of registration cannot affect the fundamental rights of the parties as they fall to be determined in this action.

The object of the action is to obtain an injunction to restrain

the defendants from using the word "Chartreuse" in connection with the sale of liqueurs other than those manufactured by the plaintiffs. The second portion of the injunction is against the ordinary case of passing off the liqueurs manufactured by the defendants as the manufacture of the plaintiffs. The true question is, "Who is entitled to use the term 'Chartreuse' as denominative of a special manufacture of liqueur?"

H. L. (E.)

1910

LECOU-
TURIER

v.

REY.

Lord Shaw of
Dunfermline.

My Lords, having given much attention to the proof, I am of opinion that a sound judgment thereon has been given by the Court of Appeal. I cannot presume to put my opinion otherwise than in these sentences of the Lord Chief Justice of England, which I respectfully adopt: "I have not the slightest doubt that for a great many years before 1901 the word 'Chartreuse' or 'Grande Chartreuse' had acquired in the English liqueur market the secondary meaning that it was a liqueur manufactured by the monks of the monastery. Whether or not the monastery included the distillery, whether or not it included outlying buildings, and whether the final product put into the bottles was actually bottled at the distillery or at the monastery is, to my mind, absolutely immaterial. It seems to me that what anybody would have understood it to mean would have been liqueur manufactured by the monks of the monastery of La Grande Chartreuse." (2)

That the liqueur was manufactured according to a secret process or recipe I hold to be proved. Whether the secret imparts any virtue to the liqueur, or whether the business and efforts of Lecouturier's assignees, working in the old locality, have succeeded in producing a liqueur as good or better, appears to me to be irrelevant, and on that head I think that the judgment of Lord Herschell in the Yorkshire Relish case (*Birmingham Vinegar Brewing Co. v. Powell* (1)) is entirely applicable. Whether, as Lord Davey in that case said, the two articles are "a wonderful match" does not seem to me to be in point, except in one particular which is not favourable to the appellants. For, my Lords, the nearer you can bring in point of appearance qualities or properties in one

(1) [1897] A. C. 710, at p. 716. the Law Journal report, 78 L. J.

(2) This passage was cited from Ch. 181, at p. 184.

H. L. (E.) article or set of goods of your manufacture to others already
 1910 protected by a trade mark, the clearer is the duty to avoid repre-
 ~~~~~  
 LECOU- presenting your goods as those others. Nor do I doubt that the  
 TURIER use of the word "Chartreuse" by the appellants would of itself  
 v. stamp the article which they produced with the reputation which  
 REY. it ought not to possess, namely, that the liqueur was made from  
 Lord Shaw of the monks' secret recipe.  
 Dunfermline.

It is said, however, that these trade marks are the subject of assignment by virtue of the French legislation and Lecouturier's appointment under it. I have already dealt with that from the international point of view, but, my Lords, I desire to add this: in no view of that legislation could it be maintained that it transferred to a liquidator the secrets within the knowledge of the monks who have proceeded to foreign countries, and, particularly in Spain, have put into operation these business secrets, and are manufacturing according to them. In short, the business of Chartreuse liqueur as such is carried on by them; and the English trade marks are therefore trade marks in respect of a thing the business in which is not, and cannot be, conducted by the appellants. The trade marks are in the latter; the business in the monks.

My Lords, such severance is not legally possible. It was not possible before the leading English statute. As Fry L.J. remarks in *Pinto v. Badman* (1), "It has been laid down by the clearest authority that a trade mark can be assigned when it is transferred together with, to use Lord Cranworth's language, 'the manufactory of the goods in which the mark has been used to be affixed.'" And s. 70 of the Patents, &c., Act, 1883, provides that "A trade mark, when registered, shall be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and shall be determinable with that goodwill." To maintain that there can be goodwill in a business the secret whereof is not transferred is, of course, out of the question.

My Lords, it is a significant commentary upon and justification of the view taken above with regard to the French legislation

(1) (1891) 8 Rep. Pat. Cas. 181, at p. 194.

and decrees that it seems to be in complete accord with the decisions come to upon the same topic by French tribunals. The appellant Lecouturier was extremely uncertain as to whether he had any right whatever under the legislation and decrees mentioned to trade marks registered in foreign countries. On December 26, 1905, he presented an application called "A petition for interpretation of decision" of the order of the Court of Appeal of Grenoble of July 19, 1905. Lecouturier states that the judgments and decisions vesting in him the Carthusian property "lack precision, inasmuch as they do not indicate with sufficient clearness that the assets of the liquidation comprise not merely the trade marks registered in France but likewise the trade marks registered in foreign countries," and he asked the Court "to pronounce and declare, by way of interpretation of its decision," that the latter trade marks were included.

The Court declined to grant the petition, narrating, among other things, that "It is not permissible for judges, under the pretext of interpreting their decisions, to make any modification therein or to add a fresh provision to them." The Court, "without taking into consideration the demand made by Lecouturier in his said capacity, declares it to be inadmissible," and condemned him in costs. It is true, my Lords, that that decision left it free to Lecouturier to take such recourse as he might think fit; but in the course of the narrative a most significant commentary is made upon the law of July 1, 1901, by the learned judges. It is in these terms: "The liquidator's claim to the ownership of the trade marks registered in foreign countries raises the question of whether the law of 1st July, 1901, which is an exceptional and police law, is operative or not outside the territory of the Republic." It is accordingly clear that, when the English Courts are appealed to on the ground that the law of the Republic referred to operated a transfer of foreign trade marks, that is, done in face of a judicial declaration by high French authority that the law sought to be enforced abroad was an exceptional and police law. This has no remote bearing upon the general question and confirms, in my opinion, the conclusion arrived at by your Lordships.

I think it right further to add that what appears to me to have

H. L. (E.)

1910

LECOU-  
TURIERv.  
REY.Lord Shaw of  
Dunfermline.



H. L. (E.)

1910

LECOU-  
TURIERv.  
REY.Lord Shaw of  
Dunfermline.

been very near to the question raised in this case has also been settled adversely to the defendants in the Courts of France. When the monks migrated to Spain and there set up the business according to their secret recipe, "La Union Agricola Sociedad Anonima" was formed for the purpose of conducting the trade, and the liqueurs manufactured in Spain were sold in bottles bearing the words "Les pères Chartreux." On May 18, 1905, the civil tribunal of Grenoble pronounced judgment in a litigation upon this subject. That judgment narrates as follows: "Whereas by application of the law of 1st July, the Grande Chartreuse mark may, indeed, have remained in the hands of the liquidator of the dissolved and expelled congregation, but the secrets or process of manufacture were carried away by the Chartreuse monks as an unseizable property seeing that non-patented processes remain unknown, and the mark was thus separated from the product whose origin it had, until then, guaranteed. Whereas this special situation resulting from new legislation brings into presence on the one hand the liquidator who sells under the old Grande Chartreuse mark a product which is not manufactured by the Chartreux monks, and on the other hand the Chartreux monks, whose right to manufacture liqueurs according to their processes Lecouturier admits, but whom he wishes to prohibit from using their name to characterize and distinguish the products manufactured by them. . . . Whereas the mark is chiefly valuable through the product which it protects and not in itself without the product, although according to our law contrary to the legislation of other countries the product and the mark are not indissolubly bound together."

The finding of that Court was that the Union Agricola is entitled to use in its label the name "pères Chartreux" in order to designate the manufacturers of the liqueur manufactured at Tarragona, and that it has not committed the misdemeanour of usurpation of name. Nothing, my Lords, could be clearer in the result than that the Tarragona manufacture by the monks and according to the secret is, according to French judicial opinion, not interfered with by the law of July 1, 1901, and that even the products of that manufacture can be sold in France with the name "Les pères Chartreux." The French judges note the fact,

which is in accordance with English law, that outside of France the business and the marks should go together. It is accordingly, in conclusion, my Lords, satisfactory to observe that the decision of your Lordships' House, far from being out of harmony with the lines of French procedure, whether judicial or legislative, appears to be in entire accord with its provisions and its limitations.

H. L (E.)

1910

LECOU-  
TURIER

v.

REY.

Lord Shaw of  
Dunfermline.

I agree in thinking that the decision of the Court of Appeal ought to be sustained.

LORD LOREBURN L.C. My Lords, I have very few words to add. I agree with the decision of the Court of Appeal. I desire to say that I do not think any reflection rests upon the French judicial officer, Monsieur Henri Lecouturier, who is an appellant in this case, but this property (for property it is) which has come in question in this appeal is property situated in England, and must therefore be regulated and disposed of in accordance with the law of England. I am glad to think that in so holding we are not affirming anything inconsistent with the decisions of the French Court, to which we, of course, at all times desire to pay the most becoming respect.

*Orders of the Court of Appeal affirmed and appeals  
dismissed with costs.*

*Lords' Journals, March 18, 1910.*

*Solicitors: Steavenson & Couldwell; Hollams, Sons, Coward & Hawksley; Solicitor to Board of Trade; McKenna & Co.*

## [HOUSE OF LORDS.]

H. L. (Sc.) ANDREW CARMICHAEL (JUDICIAL FACTOR) . APPELLANT ;  
 1910  
 March 3. GREENOCK HARBOUR TRUSTEES . . . RESPONDENTS.

*Judicial Factor—Receiver—Power to increase Rates—Greenock Harbour Act, 1880 (43 & 44 Vict. c. clxx.), s. 70—Greenock Harbour Act, 1888 (51 & 52 Vict. c. cxiii.), ss. 21, 22.*

By the Greenock Harbour Act, 1880 (43 & 44 Vict. c. clxx.), s. 70, "Every application for a judicial factor under the provisions of this Act shall be made to the sheriff, and on any such application the sheriff may by order in writing, after hearing the parties, appoint some person to receive the whole or a competent part of the rates and duties and other revenues of the trust, until all the arrears of interest or of principal, as the case may be, . . . be fully paid."

The appellant, as judicial factor of the Greenock Harbour Trust, claimed to be entitled to demand for sugar shipped into or unshipped from vessels (foreign) at the port and harbour of Greenock the rate of 1s. 3d. per ton, being the maximum rate authorized by the Greenock Harbour Act, 1880. This rate was fixed by the appellant in opposition to the wishes of the respondents, the Greenock Harbour trustees, who insisted that the rate should be only 10d. per ton, the rate fixed by the respondents prior to the appointment of the appellant :—

*Held* (affirming the decision of the First Division of the Court of Session, Scotland), that the judicial factor was merely a receiver of the tolls and income of the undertaking and not its manager, and that he had no implied authority to increase or destroy the different sources of revenue.

APPEAL from the First Division of the Court of Session, Scotland. (1)

The appellant was the judicial factor of the Greenock Harbour Trust, and the respondents were the trustees of the said trust. The action was raised by the respondents for a declarator that the appellant, as judicial factor as aforesaid, had no power to raise or reduce or in any way vary the rates and duties fixed by the respondents for goods shipped or unshipped at any of the works of the respondents, and in particular that the appellant had no power to raise the rate for sugar shipped into or unshipped from vessels (foreign) at the

(1) (1908) S. C. 944.

works of the respondents from 10*d.* per ton, being the rate fixed by the respondents, to 1*s.* 3*d.* per ton.

On August 5, 1905, the sheriff-substitute at Greenock, on the application of certain holders of B debenture stock of the Greenock Harbour Trust, appointed the appellant as judicial factor to receive the whole or a competent part of the rates and duties and other revenues of the Greenock Harbour Trust until all the arrears of interest or of principal, as the case may be, due to the holders of Greenock Harbour B debenture stock, together with all costs, including the charges of receiving the said rates and duties and other revenues, should be fully paid. The question which was raised in the present case was whether the appellant had, in virtue of the terms of his appointment as judicial factor, power at his own hand, and contrary to the determination of the respondents, to raise or reduce or in any way vary the rates and duties fixed by the respondents.

H. L. (Sc.)  
1910  
CARMICHAEL  
v.  
GREENOCK  
HARBOUR  
TRUSTEES.

The port and harbour of Greenock from a very early period have formed a public undertaking of great importance in connection with the shipping trade in Scotland, and their administration has been the subject of a long series of statutes, the first of which dates from 1773. By an Act of 1880 (43 & 44 Vict. c. clxx.) the trustees had by s. 66 thereof been authorized to borrow at interest on the security of the rates and duties and other revenues of the trust any sum which, together with the amount already authorized to be borrowed before the passing of that Act, should not exceed 1,300,000*l.* (increased by a subsequent Act of 1884 to 1,800,000*l.*), and “for securing repayment of the money so borrowed with interest, the trustees may assign over the rates and duties and other revenues of the trust or any part thereof, or any of those securities to the lender accordingly.” Sects. 69 and 70 of the said Act of 1880, which by the said Act of 1884 were, *inter alia*, held to apply to the money to be borrowed under the latter Act, provided as follows:

Sect. 69. “The mortgagees of the trustees may enforce payment of arrears of interest or principal or principal and interest due on their mortgages by the appointment of a judicial factor. In order to authorize the appointment of a judicial factor in respect



H. L. (Sc.) 1910  
 CARMICHAEL v. GREENOCK HARBOUR TRUSTEES.  
 — of arrears of principal, the amount owing to the mortgagees by whom the application for a judicial factor shall be made shall not be less than 5000% in the whole."

Sect. 70. "Every application for a judicial factor under the provisions of this Act shall be made to the sheriff, and on any such application the sheriff may by order in writing, after hearing the parties, appoint some person to receive the whole or a competent part of the rates and duties and other revenues of the trust until all the arrears of interest or of principal, as the case may be, then due on the outstanding mortgages, together with all costs, including the charges of receiving the said rates and duties and other revenues, be fully paid. Upon such appointment being made, all such rates and duties and other revenues shall be paid to and received by the person so appointed, and the money so received shall be so much money received by or to the use of the mortgagees, and so soon as the full amount of any interest or principal in arrear and costs has been so received the power of such judicial factor shall cease: Provided always that such judicial factor shall distribute among all the mortgagees to whom interest or principal shall be in arrear the rates and duties and other moneys which shall come into his hands, having respect in such distribution to the priorities, if any, of such mortgagees."

The securities constituted under the said Acts of 1880 and 1884 were cancelled and extinguished by the Act of 1888 (51 & 52 Vict. c. cxiii.) and no actions were to be raised. Sect. 21 is as follows: "It shall not be competent for any bondholder not entitled to priority before the expiration of two months from the passing of this Act, or the issue to him of B debenture stock in lieu of the harbour securities held by him (whichever event shall first happen), to raise any action against the trustees, or to petition for the appointment of a judicial factor, or to proceed with any such action or petition which may have been raised or presented prior to the passing of this Act, or to proceed with diligence or execution against the trustees in virtue of any judgment in any such action, nor shall it be competent for the holders of the harbour stocks to apply for the appointment of a judicial factor, except as provided in the next following section of this Act." By s. 22 the following provision was made with

regard to the rights of the holders of the substituted debenture stock in the matter of the appointment of a judicial factor :—

“In the event of the trustees failing at any time to make payment of the interest due at the expiry of any half-year, it shall be lawful for any holder of A debenture stock, and after the expiration of a period of seven years from the passing of this Act for any holder of B debenture stock, to apply to the sheriff for the appointment of a judicial factor in manner provided by section 70 of the Act of 1880.”

By s. 10 of a later statute of 1895 (58 & 59 Vict. c. cv.), s. 22 of the Act of 1888 above quoted was repealed and re-enacted, with the substitution of a period of ten years from the passing of the said Act of 1895 for the period of seven years from the passing of the Act of 1888 as the period on the expiration of which the holders of the B debenture stock might apply for the appointment of a judicial factor. The period thus fixed expired on July 6, 1905, and the interest payable to the holders of the said B debenture stock being then in arrear to an extent exceeding 5000*l.*, certain of the holders of that stock presented a petition in the Sheriff Court of Renfrew and Bute, at Greenock, craving the Court to appoint a judicial factor upon the whole undertaking of the respondents, and the appellant was appointed as mentioned above.

On October 9, 1907, the appellant addressed a letter to the respondents' general manager suggesting that the rate on sugar (foreign) levied by the respondents should be raised from 10*d.* per ton, the then and presently existing rate, to 1*s.* 3*d.* per ton, being the maximum rate authorized by Sched. A of the Act of 1880. The respondents at a meeting on November 5, 1907, declined to give effect to this suggestion by a majority of eleven votes to six. The appellant thereupon at his own hand issued and advertised a notice in the following terms :—

“Greenock Harbour Acts, 1866 to 1895. Notice is hereby given that on and after January 1, 1908, there will be levied, demanded, and taken for sugar shipped into or unshipped from vessels foreign 1*s.* 3*d.* per ton as provided in Schedule A of the Greenock Harbour Act, 1880.”

The respondents intimated to the appellant that they did not

H. L. (Sc.)

1910

CARMICHAEL

v.

GREENOCK  
HARBOUR  
TRUSTEES.

H. L. (SC.) 1910  
 CARMICHAEL  
 v.  
 GREENOCK  
 HARBOUR  
 TRUSTEES.  
 ———

recognize any right on his part to interfere with the harbour rates as fixed by them; but as the appellant maintained that he was entitled to alter the rates at his own hand irrespective of the respondents, and declined to withdraw the notice which he had issued, the respondents found themselves under the necessity of raising the present proceedings.

On February 20, 1908, the Lord Ordinary (Lord Dundas) found that the appellant had no power at his own hand to raise or reduce or in any way vary the rates and duties fixed by the respondents for goods shipped or unshipped at the respondents' works, and in particular had no power at his own hand to raise the rate for sugar (foreign) as he had attempted to do, and that the notice which the appellant had issued purporting to do so was ultra vires of the appellant and illegal, and that the appellant was not entitled to levy, demand, or take rates, duties, or charges in terms thereof.

On June 11, 1908, the First Division of the Court of Session (1) adhered to the judgment of the Lord Ordinary, but held that both parties were entitled to costs as between agent and client out of the funds in the hands of the appellant as judicial factor.

1909. Dec. 14, 16. *Sir R. B. Finlay, K.C.*, and *Sir Alfred Cripps, K.C.* (with them *R. S. Horne*, of the Scottish Bar), for the appellant. The decisions of the Courts below are erroneous. By the Railway Companies (Scotland) Act, 1867 (30 & 31 Vict. c. 126), and the corresponding English Act, 1867, c. 127, s. 4, the power to seize a railway company's stock for debt was taken away and power was given to have a receiver appointed in England and a judicial factor in Scotland; and in *Haldane v. Girvan and Portpatrick Junction Ry. Co.* (2) the powers of a judicial factor under the Railway Companies (Scotland) Act, 1867, were examined. The appellant submits that the judicial factor had the power to raise the rates to the maximum allowed by statute. At the time when the debentures herein concerned were issued it was provided that they should "form a charge on the undertaking." That would include not merely the rate

(1) (1908) S. C. 944.

(2) (1881) 8 R. 669.

actually levied, but the power to levy the rate. It is plain by the Greenock Harbour Act of 1842 (5 Vict. (sess. 2) c. liv.), ss. 20 and 21 and Sched. A; the Greenock Port and Harbour Act of 1866 (29 & 30 Vict. c. clvi.), ss. 66 and 67; and the Greenock Harbour Act of 1872 (35 & 36 Vict. c. lxxi.), s. 34 and Sched. V., that what was assigned in security of the money borrowed was not merely the rates which happened to be charged at the time when the borrowing took place, or which might happen to be charged at the time of default or the appointment of a judicial factor, but the full rate that it was possible to charge under the Act of Parliament. It is impossible to read any of the above-mentioned Acts except as giving the lenders the whole statutory powers, namely, a power to levy rates up to the maximum, and unless the judicial factor has the power to raise the rate to the extent required his office becomes a nullity. The respondents' argument in fact comes to this, that they have power to repudiate their debt. It is a necessary incident to the power to borrow money on the security of the rates that the maximum rates shall, if necessary, be enforced. Previous decisions do not apply, as the question here concerns a security on the rates up to the statutory maximum. The appellant submits that if a judicial factor is empowered to collect the rates he has also power to raise them.

H. L. (SC.)  
1910  
CARMICHAEL  
v.  
GREENOCK  
HARBOUR  
TRUSTEES.

[They also mentioned *Broad v. Edinburgh Northern Tramways Co.* (1), *Cotton v. Beattie* (2), and *Gardner v. London, Chatham and Dover Ry. Co.* (3)]

*Scott Dickson, D.F.*, and *C. A. Russell, K.C.* (with them *H. P. Macmillan*) (the first and third of the Scottish Bar), for the respondents. The only point is whether the judicial factor was entitled at his own hand to raise the rates. The respondents contend that he had no such power. The port and harbour of Greenock was a large public undertaking of great importance, and the appointment of the judicial factor was not intended to interfere with the general management of the concern. Sect. 22 of the Act of 1888 meant that the management of the harbour was to remain as it was in the hands of the trustees, and that the judicial factor

(1) (1888) 15 R. 641.

(2) (1889) 17 R. 262.

(3) (1867) L. R. 2 Ch. 201.



H. L. (Sc.) 1910  
 CARMICHAEL v. GREENOCK HARBOUR TRUSTEES.  
 —

was only to receive what the trustees with reasonable management could give him. The judicial factor is only a receiver and nothing more; and, secondly, the harbour and dock are a national concern, and statutes appointed the trustees with power to modify or increase the rates, and there are no words in the Act of 1888 or other Acts divesting the trustees of this power. Further, the scope of the right and duty of the judicial factor is strictly defined by s. 70 of the Act of 1880, and his function is limited thereby, and, by the terms of his appointment, to receiving the whole or a competent part of the rates. The statutory enactment, s. 70 of the Greenock Harbour Act, 1880 (43 & 44 Vict. c. clxx.), to which the appellant owes his appointment is practically identical in terms with s. 57 of the Companies Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 17), s. 87 of the Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16), and s. 26 of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118); and it has been held that the position of a judicial factor appointed in virtue of these statutory enactments is not that of a manager in England, nor in Scotland of a common law judicial factor, but that in both countries he is merely the receiver of the revenues of the undertaking. See the Lord President (Lord Dunedin) in the Court of Session (1), and Lord Romilly in *Ames v. Trustees of the Birkenhead Docks* (2); *Attree v. Hawe* (3); *Gardner v. London, Chatham and Dover Ry. Co.* (4); *Blaker v. Herts and Essex Waterworks Co.* (5); *Marshall v. South Staffordshire Tramways Co.* (6)

*Sir R. B. Finlay, K.C., in reply.*

The House took time for consideration.

1910. March 3. LORD LOREBURN L.C. My Lords, I agree with Lord Atkinson's reasons for affirming the order of the First Division, which I have had the advantage of reading in print.

The only observation of my own which I desire to add is this. It seems to me that the Lord Ordinary has accurately stated

(1) (1908) S. C. 954.

(2) (1855) 20 Beav. 332, 350.

(3) (1878) 9 Ch. D. 337.

(4) L. R. 2 Ch. 201.

(5) (1889) 41 Ch. D. 399.

(6) [1895] 2 Ch. 36.

the conditions under which the Court might act. If it were "satisfied that those charged by Parliament with the management of the undertaking were acting unreasonably in refusing to raise a rate or rates," the Court might require them to do so, for they owe a duty to the debenture stock holders. I do not think it would be necessary to shew dishonesty on their part. Unreasonableness in the sense of perversity would, in my opinion, suffice, though without that the Court would not interfere with their discretion.

H. L. (Sc.)  
1910  
CARMICHAEL  
v.  
GREENOCK  
HARBOUR  
TRUSTEES.  
Lord Loreburn  
L.C.

That point, however, does not arise in the present case.

THE EARL OF HALSBURY. My Lords, I concur.

LORD ATKINSON (read by LORD LOREBURN L.C.). My Lords, the question for decision in the present case is whether the appellant, as judicial factor of the Greenock Harbour Trust, is entitled to demand and receive for sugar shipped into or unshipped from vessels (foreign) at the port and harbours of Greenock the rate of 1s. 3d. per ton, being the rate authorized by the Greenock Harbour Act, 1880, in place of the rate of 10d. per ton fixed by the harbour trustees prior to the appointment of the appellant. The former rate has been fixed by the judicial factor himself, not only without the consent or approval of the trustees but in opposition to their wishes, so that the above-mentioned question resolves itself into this, whether or not the judicial factor had, having regard to the provision of the Greenock Harbour Act, 1888, power to increase the tolls fixed by the trustees under the provision of the 77th section of the Greenock Harbour Act of 1880.

The Lord Ordinary decided that the judicial factor had not the power he sought to exercise. The judges of the First Division, from whose decision this appeal has been taken, upheld the decision of the Lord Ordinary.

In my opinion both these decisions were right. They were arrived at on the ground that the judicial factor was merely the receiver of the tolls and incomings of the undertaking and not its manager, and that he did not supersede the trustees in the discharge of their duties further than was necessarily involved

H. L. (Sc.) in this receipt of the tolls, and was not clothed with their powers.

1910  
CARMICHAEL  
v.  
GREENOCK  
HARBOUR  
TRUSTEES.  
—  
Lord Atkinson.

By the above-mentioned statute of 1888 persons who had certain claims against the harbour trustees were allotted debenture stocks of two different kinds, namely, A debenture stock and B debenture stock, having somewhat different privileges and rights.

The interest on the latter description of stocks having fallen into arrear, the holders applied to have a judicial factor appointed over the undertaking.

By s. 21 of the statute, the right to have a factor appointed, otherwise than as provided in the section following, namely, s. 22, is expressly taken away, and the powers and privileges of the judicial factor when appointed must therefore be determined by the provisions of that section, coupled with the provisions of s. 70 of the Greenock Harbour Act of 1880, which it in effect incorporates, and upon those alone. The two sections run as follows: [His Lordship read s. 22 of the Act of 1888 and s. 70 of the Act of 1880, and continued:—] The period of seven years above mentioned was afterwards by the Greenock Harbour Act of 1895 extended to ten years, but the extended period had expired long before the proceedings in this case commenced.

It would appear to me to be clear that the power conferred upon the factor to be appointed under s. 70 at the suit of the debenture-holders is the power described in it and none other, namely, the power to “receive the whole or a competent part of the rates and duties and other revenues of the trust until all the arrears of interest or of principal be fully paid,” and nothing more.

So far, but only so far as it is necessary to effect this purpose, the judicial factor necessarily supersedes the trustees, but the power to “receive” rates or tolls or income does not, and in my opinion cannot, imply the power either to increase these different sources of income or to destroy them. The power and duty of the factor is confined in this respect to receiving those sums which, at the time of his appointment, the trustees were entitled to receive, not the sums which, by some act of theirs which they never performed, they might thereafter entitle themselves to receive.

Independent, then, of the close analogies between the provisions of these statutes and those other Acts referred to by the Lord President, I think, on the words of s. 70 alone, the powers of the judicial factor must be of the limited character I have mentioned, whatever may be his powers when appointed under other circumstances.

If the authority to receive the income of the trustees included by implication authority to take all steps necessary in order to augment the income to be received, the appointment of the judicial factor would, as was pointed out by Lord M'Laren, almost necessarily involve the complete supersession of the trustees in their office, since all the powers they enjoy, directly or indirectly, subserve that end, since their object in making their harbour better, safer, or more commodious is in the main to increase their receipts. Indeed, if this were not so, it would be almost impossible to define the exact limits of the factor's authority or to determine precisely what remnant of their powers should remain with the trustees. Of course the judicial factor must not starve the undertaking. He must out of the income he receives make as far as possible adequate provision for the carrying on of the undertaking as a going concern. He is then free to divide such surplus as may remain amongst the incumbrancers according to the priority of their respective claims.

In my opinion, therefore, the appeal is entirely unsustainable and should be dismissed with costs. I concur in the observations which have been made by the judges of the First Division as to the power of the Courts of law to compel the trustees not to cheat their creditors by a mala fide refusal to exercise their power to increase the tolls or rates.

LORD LOREBURN L.C. My Lords, I may add that my noble and learned friend Lord Atkinson has signified to me that he does not differ from the observation I made upon the last part of his judgment.

*Sir A. Cripps, K.C.* A memorandum has been submitted to your Lordships' House, signed by the agents for both parties,

H. L. (Sc.)  
1910  
CARMICHAEL  
v.  
GREENOCK  
HARBOUR  
TRUSTEES.  
Lord Atkinson.



H. L. (Sc.) asking that the costs should be dealt with in accordance with the way in which they were dealt with in the Court below—  
 1910  
 ~~~~~  
 CARMICHAEL v. GREENOCK HARBOUR TRUSTEES.
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 namely, that both parties are “entitled to the expenses of the cause, as between agent and client, out of the funds in the hands of the defender as judicial factor as the accounts thereof shall be taxed by the auditor.” The object, of course, is that the costs of both parties in a matter of this kind should be paid out of the fund, and that neither party should incur anything in the nature of personal liability. It has been agreed that the order as to costs should be in the above form.

*C. A. Russell, K.C.* I concur in that application on the part of the respondents.

LORD LOREBURN L.C. I think we might assent to the application. No other persons are interested. Of course the debenture-holders are, but the litigation relates to their rights.

*Ordered that the interlocutors appealed from be affirmed and the appeal be dismissed: Further ordered that the costs be paid as agreed between the parties.*

*Lords' Journals, March 3, 1910.*

Agents for appellant: *Lowless & Co., for J. & J. Ross, W.S., Edinburgh.*

Agents for respondents: *Thomas Cooper & Co., for William B. Rainnie, S.S.C., Edinburgh.*

## [HOUSE OF LORDS.]

MISS MARY LOW MACKISON (TRUSTEE) . . APPELLANT ; H. L. (Sc.)  
 AND 1910  
 MAGISTRATES OF DUNDEE . . . . . RESPONDENTS. March 8.

*Master and Servant—Burgh Surveyor—Extra Work—Delay.*

The pursuer was appointed in 1868 surveyor of police by the police commissioners of Dundee at a salary of 400*l.* (subsequently raised to 500*l.*), and continued in that office and (after 1894) as burgh surveyor to the town council until 1906. By the terms of his appointment it was stipulated that he should devote all his services to the business of the commissioners. During the thirty-eight years of his employment he did work for the commissioners in excess of what was contemplated at the time of his appointment, and particularly in regard to the promotion of various Bills in Parliament. On three occasions they paid him an honorarium, but otherwise he received no additional remuneration for his work. In 1906 he claimed and brought an action against the commissioners for 15,000*l.* in respect of extra work :—

*Held* (affirming the decision of the Court of Session), that there was no evidence on which they could be held to be liable.

APPEAL from the Second Division of the Court of Session, Scotland. (1)

The question being one of fact, a detailed report of the case is unnecessary.

*Morison, K.C.*, and *William Lowson* (both of the Scottish Bar), were heard for the appellant.

*Chree* and *Macmillan* (both of the Scottish Bar), for the respondents, were not called on.

The House (LORDS LOREBURN L.C., ASHBOURNE, KINNEAR, and SHAW OF DUNFERMLINE) dismissed the appeal, holding that there was not sufficient evidence of a contract to pay Mr. Mackison, as his legal right, an addition to his salary in respect of what was alleged to be extra work. The time which he had allowed to

H. L. (SC.) elapse before asserting his claim made the burden of proof  
1910 heavier than in an ordinary case.

MACKISON  
v.  
DUNDEE  
MAGIS-  
TRATES.

*Interlocutors appealed from affirmed with costs.*

*Lords' Journals, March 8, 1910.*

Agents for appellant : *James Mellor & Coleman, for G. R. Stewart, S.S.C., Edinburgh.*

Agents for respondents : *William Robertson & Co., for Morton, Smart, Macdonald & Prosser, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (SC.) MAGISTRATES OF AIRDRIE . . . . . APPELLANTS ;  
1910  
AND  
*April 8.* COUNTY COUNCIL OF THE COUNTY OF } RESPONDENTS.  
LANARK. . . . . }  
  
MAGISTRATES OF COATBRIDGE . . . . . APPELLANTS ;  
AND  
COUNTY COUNCIL OF THE COUNTY OF } RESPONDENTS.  
LANARK. . . . . }

*Stream—Natural Stream—Pollution—Rivers Pollution Prevention Act, 1876*  
(39 & 40 Vict. c. 75), ss. 3, 20—*Act 1893 (56 & 57 Vict. c. 31), s. 1.*

The respondents applied for an order to restrain the appellants under the Rivers Pollution Prevention Act, 1876, “to abstain from causing to fall or flow or to be carried into” certain streams which flow through or by certain parishes in the county of Lanark and within the respondents’ district “any solid or liquid sewage matter.” The appellants alleged that the burns and streams in question were not “streams” within the meaning of the Act, in respect that at the date of the passing of the Act they were mainly used as sewers. There was a definite finding in fact that the appellants discharged all their sewage into the burns in question :—

*Held* (affirming the decision of the First Division of the Court of

Session), that the burns in question were "streams" and not "water-courses mainly used as sewers" within the meaning of the Rivers Pollution Prevention Act, 1876.

APPEAL from interlocutors of the First Division of the Court of Session, the last material one being dated June 4, 1909. (1)

These were two special cases which were brought under the provisions of the Rivers Pollution Prevention Act, 1876, submitting for review a finding of the sheriff. The complaint was in each case at the instance of the county council of the county of Lanark (Local Government (Scotland) Act, 52 & 53 Vict. c. 50, s. 55) and was directed against the town councils of Airdrie and Coatbridge in their capacity as public health authority. The complaint sought a declaration that these two public authorities were committing an offence under s. 3 of the Rivers Pollution Prevention Act, 1876, and should be restrained from so doing. The offence which the appellants were alleged to have committed was that they had allowed sewage matter from their system of drains to go into a set of small streams which flowed through parishes in the county of Lanark and the waters of which ultimately reached the river Clyde. Sect. 3 of the Act of 1876 is as follows: "Every person who causes to fall or flow, or knowingly permits to fall or flow, or to be carried into any stream any solid or liquid sewage matter, shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act." The section continues:—"Where any sewage matter falls or flows or is carried into any stream along a channel used, constructed, or in process of construction at the date of the passing of this Act for the purpose of conveying such sewage matter, the person causing or knowingly permitting the sewage matter so to fall or flow or to be carried shall not be deemed to have committed an offence against this Act, if he shews to the satisfaction of the Court having cognizance of the case that he is using the best practicable and available means to render harmless the sewage matter so falling or flowing or carried into the stream." Sect. 20 of the Rivers Pollution Prevention Act, 1876, defines "stream" as including "rivers, streams, canals, lakes and watercourses, other

H. L. (Sc.)

1910

AIRDRIE  
MAGIS-  
TRATES

v.

LANARK  
COUNTY  
COUNCIL.

COATBRIDGE  
MAGIS-  
TRATES

v.

LANARK  
COUNTY  
COUNCIL.

(1) Reported at an earlier stage, (1906) 8 F. 802.



H. L. (SC.)

1910

AIRDRIE  
MAGIS-  
TRATES

v.

LANARK  
COUNTY  
COUNCIL.

COATBRIDGE

MAGIS-  
TRATES

v.

LANARK  
COUNTY  
COUNCIL.

than watercourses at the passing of this Act mainly used as sewers and emptying directly into the sea, or tidal waters . . . .”

The following statement of facts is taken from the opinion of the Lord President:—The appellants deny that the streams mentioned in the petition were streams in the sense of the Act. The offence they are alleged to have committed is that they have allowed sewage matter from their system of drains to go into a certain set of small streams. This was practically admitted, but the defence of the appellants, as well as that above mentioned, was that they took over their system of drains to a great extent prior to the passing of the Act of 1876, and that as a matter of fact the small streams in question had long ago been turned into what were practically sewers. On that they contended that no offence could be committed under the Act, for once a stream is covered up and made a drain of, it ceases to be a stream. The appellants also maintained that, as the sewage was being contributed by other persons who had, as they alleged, a prescriptive right to put in the sewage, they could not be “causing to fall or flow or knowingly permitting to fall or flow” that sewage. On this head the Act of 1893 (56 & 57 Vict. c. 31), s. 1, provides: “Where any sewage matter falls or flows or is carried into any stream after passing through or along a channel which is vested in a sanitary authority, the sanitary authority shall for the purposes of section 3 of the Rivers Pollution Prevention Act, 1876, be deemed to knowingly permit the sewage matter to fall or flow or be carried.”

The First Division (July 9, 1907) held that a stream does not cease to be a stream because as a matter of fact, after a portion of its passage through land, you cover it up and practically make a drain of it. It still retains its character as a stream, which is not purely historic, and it emerges as a stream after you get outside the territory of the defenders: see s. 20 of the Act of 1876 (given above). They also found on the second point that in view of the Act of 1893 it was out of the question to say that the local authorities had not permitted any solid or liquid sewage matter to flow or be carried into any stream. And the Lord President (Lord Dunedin), continuing, said: “The result as far as I have gone at present, therefore, seems to me this, that

the learned sheriff is perfectly right in holding that upon the face of the proceedings there had here been an offence committed, and that the local authorities of these two burghs could not take any help either, first, from the fact that the sewage was put in by persons who, they allege, to a great extent had a prescriptive right to put it in, or, secondly, from the fact that they further said that other things went in which rendered the sewage innocuous." Their Lordships, however, then allowed the appellants to amend their record by adding thereto the following averment:—"At the point where said burns or streams leave the territorial jurisdiction of the defenders and enter that of the pursuers they are not polluted by solid or liquid sewage matter." Consequently the case went again before the sheriff-substitute (July 13, 1908), when proof was led relative to the amendment, and the sheriff (December 30, 1908), and they held that the defenders had failed to prove their averment in the amendment upon record, but sent it back to the sheriff-substitute to ascertain what remedial measures should be enforced under s. 10 of the Act of 1876. On June 4, 1909, the First Division affirmed the sheriff. The Lord President said: "The cases went back to the sheriff for the elucidation of one point and one point only, which was raised by the new averment which the" appellants "have thought fit to make, namely, the averment that these streams of small volume into which admittedly the sewage, untouched, of two large towns was put, nevertheless, at a space of something I think less than a mile below, entered the territory of the complainers in a pure condition. It did not seem likely that that averment could be proved, and I am bound to say that I do not think it has been proved. The result of the inquiry has left no doubt upon my mind whatsoever that these streams are polluted by solid and liquid sewage matter."

H. L. (Sc.)  
1910  
AIRDRIE  
MAGIS-  
TRATES  
v.  
LANARK  
COUNTY  
COUNCIL.  
COATBRIDGE  
MAGIS-  
TRATES  
v.  
LANARK  
COUNTY  
COUNCIL.

April 7, 8. *Sir Alfred Cripps, K.C.*, and *R. S. Horne* (the latter of the Scottish Bar), for the appellants. The appellants raise no question on the findings of fact, but the burns alleged to be polluted are not streams, but sewers, and there is no law against the pollution of sewers. The real point, therefore, is that the appellants contend that they did not pass polluted matter

H. L. (SC.) 1910  
 AIRDRIE  
 MAGIS-  
 TRATES  
 v.  
 LANARK  
 COUNTY  
 COUNCIL.  
 COATBRIDGE  
 MAGIS-  
 TRATES  
 v.  
 LANARK  
 COUNTY  
 COUNCIL.

into streams in the sense of the Act, but into sewers, and, if so, there has been no contravention of the Act. The issue is now, were the burns in question "streams" or "sewers"? The appellants asked the sheriff to allow them a proof of their averments that these burns were sewers and not streams, and he refused. The appellants maintained that if they were able to establish the facts alleged by them, then it was clear, on the strength of the decision in *West Riding of Yorkshire Rivers Board v. Gaunt & Sons* (1), that the burns in question here had really become sewers. Where a stream has been tunnelled up it ceases to be a watercourse to which the Rivers Pollution Prevention Act applies. [They also cited *West Riding of Yorkshire Rivers Board v. Preston & Sons* (2) and Lord Justice Clerk Moncreiff in *Magistrates of Portobello v. Magistrates of Edinburgh*. (3)]

*John Wilson, K.C.*, and *Hon. William Watson* appeared for the respondents, but were not called on.

#### Judgment in the first appeal:—

LORD LOREBURN L.C. My Lords, this argument has the merit of singularity and also of ingenuity, but I think it is one of the most hopeless arguments I have heard for a considerable time.

The Rivers Pollution Prevention Act of 1876 prohibits the pouring of sewage into streams. It defines "streams" so as to include all watercourses except "watercourses at the passing of this Act" (namely, 1876) "mainly used as sewers emptying directly into the sea or tidal waters." The obvious policy and the obvious effect of the Act is to stop the pouring of foul water into a stream, but it excuses this being done in certain circumstances, as for example if it was being done as long ago as 1876, and the best practicable means are now used to render it harmless.

It is difficult to think of a simpler Act or one more clearly expressed. The Act states that you must not foul a stream except under particular conditions. Now, my Lords, undoubtedly

(1) (1902) 67 J. P. 183; 1 L. G. R. 133.

(2) (1904) 92 L. T. 24; 69 J. P. 1.

(3) (1882) 10 R. 130, 139.

and admittedly the now appellants do foul these burns or courses of running water which come also clearly within the definition of "streams" in the Act of 1876, and for the present hearing it must be taken that they did not bring themselves within any of the exceptions or entitle themselves to any of the excuses which are set forth in the Act. There is a point reserved upon that with which the judgment of this House will have nothing to do. Of course that point reserved is still reserved. But what the appellants say is this: Permit us to prove that these burns are sewers, and if we can prove that they are sewers, surely it cannot be an offence to pour sewage matter into the sewers. My Lords, that is merely asking leave to prove that they have with or without the contribution of others committed in an aggravated degree the very offence with which they are charged. The object of the Act is to prevent streams being turned into sewers, and this is what they propose to do and have done.

My Lords, it is very likely indeed that these burns have been made so dirty that they are in fact such as commonly would be called sewers. I really do not know whether that be so or not, but this I do know upon the record here, that the appellants have done what is forbidden by the Act of Parliament and have not brought themselves within any of the exceptions or excuses which are laid down and provided in the Act.

My Lords, reference has been made to several cases, notably to *Gaunt's Case*. (1) I think *Gaunt's Case* (1), so far as I can see, has been misunderstood, but if *Gaunt's Case* (1) or any other case expresses any opinion inconsistent with the view which I have ventured to express, I for one should wholly decline to be bound by it.

I therefore move your Lordships that this appeal be dismissed with costs.

EARL OF HALSBURY. My Lords, I am entirely of the same opinion, but I wish to add that *Gaunt's Case* (1) appears to me to have been perfectly rightly decided, and the argument founded upon it was, I think, founded upon an entire misapprehension of what that case decided. Otherwise I entirely concur with

H. L. (Sc.)

1910

AIRDRIE  
MAGIS-  
TRATES

v.

LANARK  
COUNTY  
COUNCIL.COATBRIDGE  
MAGIS-  
TRATES

v.

LANARK  
COUNTY  
COUNCIL.Lord Loreburn  
L.C.



H. L. (Sc.) 1910 what the Lord Chancellor has said. I think this case was hopelessly unarguable.

AIRDRIE  
MAGIS-  
TRATES

v.

LANARK  
COUNTY  
COUNCIL.

LORDS JAMES OF HEREFORD, ATKINSON, COLLINS, and SHAW OF  
DUNFERMLINE concurred.

COATBRIDGE  
MAGIS-  
TRATES

v.

LANARK  
COUNTY  
COUNCIL..

*Ordered that this appeal be dismissed with costs.*

*Lords' Journals, April 8, 1910.*

At the conclusion of the judgment in the first appeal mentioned above—

LORD LOREBURN L.C. The order will be the same, I take it, in the appeal of the *Magistrates of Coatbridge v. County Council of the County of Lanark*.

*Sir Alfred Cripps, K.C.* Yes, it will be the same. Your Lordships' decision governs the two cases.

*John Wilson, K.C.* That is so.

*Ordered that this appeal be dismissed with costs.*

*Lords' Journals, April 8, 1910.*

Agent for appellants: *John Kennedy, W.S., for Drummond & Reid, W.S., Edinburgh, in the first appeal; and for Laing & Motherwell, W.S., Edinburgh, in the second appeal.*

Agents for respondents in both appeals: *Grahames, Currey & Spens, for Ross, Smith & Dykes, S.S.C., Edinburgh.*

## [HOUSE OF LORDS.]

GLASGOW NAVIGATION COMPANY . . .	APPELLANTS;	H. L. (SC.)
	AND	1910
IRON ORE COMPANY . . . . .	RESPONDENTS.	<u>April 6.</u>

*Shipping—Demurrage—Charterparty—Bill of Lading not put in Evidence—Hypothetical Case.*

Action dismissed when it appeared to the House to have been brought to try a hypothetical case. No costs.

APPEAL from a judgment of the Second Division of the Court of Session dated July 20, 1909. (1)

The action was raised in the Sheriff Court of Lanarkshire by the appellants against the defenders, the charterers, in respect of time lost in the discharge of the appellants' vessel. The Court of Session held that the delay was due to a cause for which the defenders were exempt from liability by the terms of the charterparty.

The appeal was fully argued on December 17, 1909. A question of competency raised by the respondents under the Judicature Act of Scotland (6 Geo. 4, c. 120), s. 40, was first argued, but it was avoided by the appellants limiting their contention to the construction of the charterparty and not questioning the facts. The case was then fully heard on the question of construction.

The House took time to consider their judgment.

On April 6, 1910, the parties were summoned again to the Bar to explain why the bill of lading was not put in evidence.

Counsel and a witness stated that "the case proceeded on the basis that the charterers were in point of fact the owners of the cargo, and on that basis only, and it was not thought by" either party "that it was necessary to call for and put in process the bill of lading."

(1) (1909) S. C. 1414.

H. L. (SC.) *Bailhache, K.C.* (with him *Sandeman, K.C.*, of the Scottish Bar), for the appellants.

1910

GLASGOW  
NAVIGATION  
COMPANY  
v.  
IRON ORE  
COMPANY.

*Morten, K.C.*, and *F. T. H. Henlé*, for the respondents.

The House (LORD LOREBURN L.C. and LORDS ATKINSON and SHAW OF DUNFERMLINE), being of opinion that the action was brought to try a hypothetical case, owing to the agreement of both parties not to put in evidence the bill of lading, declined to make any order, except that the action be dismissed and that no costs be allowed to either party here or below.

LORD LOREBURN L.C. stated that it was not the function of a Court of law to advise parties as to what would be their rights under a hypothetical state of facts.

The following order was made :—" Counsel were called in, and a preliminary objection having been taken as to the competency of the said appeal, and counsel having been heard thereon and having been directed to argue the merits of the appeal, counsel were accordingly heard to argue the merits . . . and due consideration being had of what was offered on either side in this cause ; and it appearing to their Lordships that the pursuers and defenders, though without any wrong purpose, concurred in asking for an order upon the footing that they were bound by a contract different from the contract by which they were actually bound, the House declines to make any other order than the following, viz. :—"

*Ordered and adjudged that this action be dismissed ;  
and it is further ordered that no costs be  
allowed to either side here and below.*

*Lords' Journals, April 6, 1910.*

Agents for appellants : *Holman, Birdwood & Co.*, for *J. & J. Ross, W.S.*, Edinburgh.

Agents for respondents : *Morten, Cutler & Co.*, for *Macpherson & Mackay, S.S.C.*, Edinburgh, and *Galbraith & Macpherson*, Glasgow.

## [PRIVY COUNCIL.]

ARCHIBALD NUGENT ROBINSON . . . .	PLAINTIFF ;	J. C.*
	AND	1909
BALMAIN NEW FERRY COMPANY, LIMITED	DEFENDANTS.	<u>Dec. 10.</u>
ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.		

*Action for False Imprisonment—Contract as to Entry on and Exit from Wharf—  
Unreasonable Conduct of Plaintiff—Nonsuit.*

In an action for damages for assault and false imprisonment it appeared that the plaintiff had contracted with the defendants to enter their wharf and stay there till the boat should start and then be taken by the boat to the other side. No breach of the defendants' undertaking was alleged, but the plaintiff after entry changed his mind and desired to effect an exit from their wharf without payment of the prescribed toll for exit, and was for a time forcibly prevented:—

*Held*, that he ought to have been nonsuited. The toll imposed was reasonable and the defendants were entitled to resist a forcible evasion of it.

APPEAL by special leave from an order of the High Court (December 18, 1906) reversing a judgment of the Supreme Court of New South Wales (May 4, 1906) which discharged a rule nisi for a new trial or a verdict for the defendants in an action by the appellant, a barrister-at-law of the State of New South Wales, for assault and false imprisonment.

The respondents carry on the business of a harbour steam ferry between the city of Sydney and Balmain and have on the Sydney side of their steam ferry a wharf and premises held by them under lease from the Sydney Harbour Trust Commissioners. A barrier with two turnstiles separates the wharf from the street. Persons coming upon the wharf enter it by one of the turnstiles and leave it by the other. There is also a gate with a door in it opening parallel to the street and at right angles to the turnstiles. At each turnstile an officer of the respondents is stationed. By the lawful regulations of the respondents, one penny has to be paid by all persons entering

\* *Present*: LORD LOREBURN L.C., LORD MACNAGHTEN, LORD COLLINS, and SIR ARTHUR WILSON.



J. C.  
1909  
ROBINSON  
v.  
BALMAIN  
NEW FERRY  
COMPANY,  
LIMITED.

the wharf to the officer at the entry turnstile and by all persons leaving the wharf to the officer at the exit turnstile. No other charge is made for the use of the ferry, either to or from Balmain. The turnstiles automatically register the number of persons passing through them and so check the takings of the two officers.

A few feet above the two turnstiles and on each side of the barrier is a notice board placed so as to be seen by passengers, on which is painted the words " Notice. A fare of one penny must be paid on entering or leaving the wharf. No exception will be made to this rule, whether the passenger has travelled by the ferry or not."

On June 5, 1905, at about 7.45 P.M., the appellant entered the wharf by the entry turnstile, intending to cross to Balmain by one of the respondents' steamers. He paid one penny to Penson, the officer of the respondents in charge of the entry turnstile. Finding that the next steamer would not start for some twenty minutes, the appellant informed Penson of his wish to leave the wharf, and was directed by him to the exit turnstile. Anderson, the officer in charge thereof, demanded a penny, which the appellant declined to pay. He then endeavoured to force his way past the two officers, who for a time prevented him. Eventually he succeeded in getting past them and squeezed himself through a narrow space between the entry turnstile and the bulkhead into the street.

At the trial Darley C.J. refused to nonsuit, directing the jury that there was no evidence that the appellant knew of the notice when he went on to the respondents' wharf. The jury found a verdict for the appellant for 100l.

On February 12, 1906, a rule nisi was granted to set aside the verdict and for a new trial or nonsuit or verdict for the respondents on the grounds that the Chief Justice was in error in directing the jury that the respondents had no right to demand payment of a penny from the appellant for passing through the turnstile to leave the wharf, and that his Honour should have directed the jury that if they came to the conclusion that the respondents had done what was reasonable to give persons going on the wharf notice of the terms on which they

were admitted to the wharf, the jury were entitled to find that the appellant was bound by that notice.

Owen and Pring JJ. (see 6 S. R. N. S. W. 195) held that the rule should be discharged, as there was not sufficient evidence that the appellant was aware of or saw the notice board, and that the question whether the appellant knew of the notice board was immaterial, inasmuch as his knowledge of the notice board could not afford any palliation of the wrong committed by the respondents' servants. Cohen J. held that a new trial on the question of damages should be ordered, for if the respondents had done all that was reasonable to give the public notice of the terms on which they could enter and leave the wharf the appellant was bound by such notice, and the matter was accordingly one which should have been considered by the jury when assessing the damages.

The High Court (see 4 C. L. R. 379) reversed this order. Griffith C.J. and Barton J. held that the appellant was aware of the terms on which he had obtained admittance to the wharf; that it followed that he had agreed to be bound by them; and that there was no evidence that anything had been done to the appellant by the respondents' servants which was not authorized by such terms. O'Connor J. held that the appellant knew of the terms on which he entered the wharf; that the respondents were lawfully entitled to demand a penny from the appellant on his leaving the wharf; that the appellant had not been imprisoned or assaulted by the respondents' servants; and that the respondents were entitled to prevent the appellant from leaving the wharf without payment.

*Danckwerts, K.C.*, and *C. Lacey Smith*, for the appellant, contended that no contract had been made between the parties to this appeal under which the respondents could claim the right by their servants to prevent the appellant from leaving their wharf. The respondents were not entitled to insist on the appellant going through the exit turnstile and paying a penny; nor had they the right to prevent his leaving the wharf except by water or ferry. The consideration for the payment already made had failed, for the appellant was not bound to wait, and

J. C.

1909

ROBINSON

v.

BALMAIN  
NEW FERRY  
COMPANY,  
LIMITED.

—

J. C. he therefore became entitled to leave, and the conduct of the  
 1909 respondents' servants in forcibly preventing him from doing so  
 ROBINSON was unlawful and wrongful. The appellant had a good cause of  
 v. action and the jury were justified in the verdict which they  
 BALMAIN gave, and the appellant was entitled to judgment. Reference  
 NEW FERRY was made to *Poulton v. London and South Western Ry. Co.* (1);  
 COMPANY, *Butler v. Manchester, Sheffield, and Lincolnshire Railway* (2);  
 LIMITED, *Harvey v. Mayne* (3); *Farry v. Great Northern Ry. Co.* (4)

*Dickens, K.C.*, and *Theobald Mathew*, for the respondents, contended that the appellant was not entitled to verdict and judgment and that the judgment of the High Court was right. The respondents had taken all reasonable steps to give notice to the appellant before he came on to their wharf of the terms on which he would be admitted thereto, and the appellant was shewn to have been fully acquainted therewith. It was therefore a part of the contract on which the appellant entered the wharf that if he left it except by the ferry he must like all other persons pay a penny for so doing. The respondents had therefore a contractual right to demand it and to prevent his leaving without payment. They did not imprison or assault him, and used only the necessary force to prevent his unauthorized exit, the amount of which proved insufficient for that purpose. The consideration for the penny paid on entrance was exhausted, and it was unreasonable and wrongful for the appellant to attempt a forcible exit without complying with the terms to which he had assented, and which were in themselves reasonable and applicable to all persons. Reference was made to *Bird v. Jones*. (5)

*Danckwerts, K.C.*, in reply.

1909  
 Dec. 10.

The judgment of their Lordships was delivered by

LORD LOREBURN L.C. In this case their Lordships entirely agree with the conclusion of the High Court. There has been considerable difficulty because of the way in which the case seems to have been presented in the Courts in Australia, and particularly

(1) (1867) L. R. 2 Q. B. 534.

(3) (1872) 6 I. R. C. L. 417.

(2) (1888) 21 Q. B. D. 207.

(4) [1898] 2 I. R. (Q.B.) 352.

(5) (1845) 7 Q. B. 742.

in the Supreme Court of New South Wales. There is no note of the summing up of the learned judge who tried the case, and some of the arguments which have been advanced by the learned counsel for the respondents are not consistent with the arguments that were advanced on their behalf in the Australian Courts. But their Lordships think that the relevant facts are all quite beyond dispute, and that some of the facts disputed are quite immaterial.

The plaintiff paid a penny on entering the wharf to stay there till the boat should start and then be taken by the boat to the other side. The defendants were admittedly always ready and willing to carry out their part of this contract. Then the plaintiff changed his mind and wished to go back. The rules as to the exit from the wharf by the turnstile required a penny for any person who went through. This the plaintiff refused to pay, and he was by force prevented from going through the turnstile. He then claimed damages for assault and false imprisonment.

There was no complaint, at all events there was no question left to the jury by the plaintiff's request, of any excessive violence, and in the circumstances admitted it is clear to their Lordships that there was no false imprisonment at all. The plaintiff was merely called upon to leave the wharf in the way in which he contracted to leave it. There is no law requiring the defendants to make the exit from their premises gratuitous to people who come there upon a definite contract which involves their leaving the wharf by another way; and the defendants were entitled to resist a forcible passage through their turnstile.

The question whether the notice which was affixed to these premises was brought home to the knowledge of the plaintiff is immaterial, because the notice itself is immaterial.

When the plaintiff entered the defendants' premises there was nothing agreed as to the terms on which he might go back, because neither party contemplated his going back. When he desired to do so the defendants were entitled to impose a reasonable condition before allowing him to pass through their turnstile from a place to which he had gone of his own free will. The payment of a penny was a quite fair condition, and if he did not choose to comply with it the defendants were not bound to let

J. C.  
1909  
ROBINSON  
"."  
BALMAIN  
NEW FERRY  
COMPANY,  
LIMITED.



J. C.  
1909  
ROBINSON  
v.  
BALMAIN  
NEW FERRY  
COMPANY,  
LIMITED.

him through. He could proceed on the journey he had contracted for.

Under these circumstances their Lordships consider that, when the defendants at the end of the case submitted that there ought to be a nonsuit, the learned judge ought to have nonsuited the plaintiff. Their Lordships are glad that they can thus arrive, in accordance with law, at this decision, because they regard the plaintiff's conduct as thoroughly unreasonable in this case.

Their Lordships are very much indebted to Mr. Dickens for his extremely concise and able argument.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant : *J. H. Galbraith.*

Solicitors for respondents : *Young, Jones & Co.*

[PRIVY COUNCIL.]

J. C.*	HAMILTON GAS COMPANY, LIMITED . .	PLAINTIFFS ;
1910	AND	
Feb. 22, 23 ;	MAYOR, COUNCILLORS, AND BURGESSES }	DEFENDANTS.
March 18.	OF THE BOROUGH OF HAMILTON . . }	

ON APPEAL FROM THE SUPREME COURT OF NEW ZEALAND.

*Law of New Zealand—Municipal Corporations Act, 1886, ss. 369, 370—  
Hamilton Gas Works Act, 1895, s. 46—Construction—Expropriation—  
Value of Gasworks as a going Concern.*

Under New Zealand Hamilton Gasworks Act, 1895 (59 Vict. No. 1), statutory power was granted to construct and maintain gasworks in the town of Hamilton and to supply the said town and its suburbs with gas. Sect. 46 provided that the Hamilton Corporation should be entitled at any time after the expiration of twelve years from the date of the Act coming into operation "to purchase the gasworks and plant at a price to be determined by arbitration" :—

*Held* that, on the true construction of the section, the price to be paid

\* *Present* : LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and SIR ARTHUR WILSON.

for the said gasworks and plant should be the commercial value thereof as a going concern, and not merely their structural value.

The respondents were constituted by the Municipal Corporations Act, 1886 (50 Vict. No. 50), and if they had exercised their powers of acquisition under ss. 369 and 370 of that Act would have had to pay the full commercial value. Had the intention of the Act of 1895 been to introduce a more limited signification of the term "gasworks," the language used should have plainly excluded therefrom either monopoly, goodwill, or undertaking as such.

J. C.

1910

HAMILTON  
GAS  
COMPANY,  
LIMITED  
v.  
HAMILTON  
CORPORATION.

APPEAL from a judgment of the Supreme Court (February 26, 1909) for enforcing an award.

The appellants are a limited company formed for supplying gas to the borough of Hamilton, and acquired the rights of one Henry Atkinson under the Hamilton Gasworks Act, 1895. The material provisions thereof and also of the Municipal Corporations Act, 1886, under which the respondents are constituted (having been repealed and re-enacted by the corresponding Act of 1900) are set out in their Lordships' judgment. The twelve years mentioned in s. 46, sub-s. 1, of the Act of 1895 expired on May 5, 1908.

The respondents having given notice of their intention to acquire the gasworks and plant mentioned in the said s. 46, Ellis and Morrison were appointed arbitrators and Goldie the umpire to fix the amount of the purchase-money. The umpire fixed 31,382*l.* 7*s.* as the price if the commercial value thereof as a going concern should be estimated, and 13,539*l.* if their value in situ should be estimated, excluding the goodwill and powers of the undertaking. As the arbitrators disagreed, the umpire stated a case for the opinion of the Supreme Court as to the basis on which he should proceed. The Court of Appeal on August 3, 1908, adjudged in answer to question (a) in the said case that "the price to be paid for the gasworks and plant should be merely the value of the gasworks and plant regarded as gasworks and plant in situ capable of earning a profit. The price is 13,539*l.*"; and thereafter on December 9, 1908, the umpire made his award for that amount. The Supreme Court adopted this judgment.

Stout C.J. considered that s. 353 of the Municipal Corporations Act, 1886, having given power to the borough council

J. C.  
1910  
HAMILTON  
GAS  
COMPANY,  
LIMITED  
v.  
HAMILTON  
CORPORATION.  
—

to establish gasworks, the power given to Atkinson under the Gasworks Act to do the same thing did not take away, but only suspended, the borough's rights, and that the purchase by the borough council from the gas company was not an assignment of the statutory privilege, that the borough council did not need to purchase the right to supply gas, and that the words "gasworks and plant" were not synonymous with the word "undertaking" where used in the Gasworks Act. He did not express any opinion as to the effect of s. 369 of the Municipal Corporations Act, 1886. In his view, therefore, the structural value only should be allowed.

Williams and Cooper JJ. considered that the words "gasworks and plant" were inapt to cover "goodwill" and that the purchase was not to be of the "undertaking." They stated that if a stranger had been authorized to purchase and similar words had been used it might well be that the proper value to be placed upon the gasworks and plant would be their value to the seller as a going concern with the statutory privileges annexed to them, but as the borough council was not a stranger but a party to the Act, and as it had the exclusive right to manufacture and supply gas in the borough, such right was only suspended during the time the works remained in the hands of Atkinson or his assigns, and immediately the borough council exercised its right of purchase under the Gasworks Act such exclusive right revived.

Chapman J. considered that while s. 369 of the Municipal Corporations Act, 1886, restrained the borough council from exercising its powers under s. 353, still such restriction must be read in connection with s. 46 of the Gasworks Act, and immediately the purchase was effected thereunder the special Act ceased and the general power revived; that the gas company had only by the special Act a power to transfer, limited to twelve years' duration, and when that time expired and the borough council exercised its option of purchase, the power of the gas company to continue its business was immediately put an end to or extinguished, and therefore there was no goodwill.

*Sir R. Finlay, K.C., and Rowlatt (Balfour Browne, K.C., with them), for the appellants, contended that the Supreme Court*

ought to have ruled that they were entitled to be paid the commercial value of the gasworks and plant as a going concern. The corporation did not purchase merely the structure, but also the right to supply the borough and its suburbs with gas. In 1908 at the time when it acquired the gasworks and plant it had no right to establish similar gasworks to supply the same locality or any part thereof as was then being supplied by the appellants: see *Municipal Corporations Act, 1900, s. 332, sub-s. 2*, which prohibited them from doing so unless under the authority of a special Act. Under s. 353 of the Act of 1886 they had no exclusive right to manufacture and supply gas in the borough. Whatever rights they had under that section were taken away, and it became unlawful for the respondents to exercise them as soon as the appellants' gasworks had been established under their special Act of 1895. After their purchase under s. 46 of that Act their right to supply gas in the locality in question was as assignees of the appellants' right and should be paid for. All rights taken over under this purchase should be paid for as part of the undertaking, the word "undertaking" being used in s. 44, and "gasworks" and "plant" in s. 46, sub-s. 1, being intended to have the same meaning. Reference was made to *Stockton and Middlesbrough Water Board v. Kirkleatham Local Board* (1); *Toronto Street Ry. Co. v. Corporation of the City of Toronto* (2); *London Street Tramways Co. v. London County Council* (3); *Edinburgh Street Tramways Co. v. Lord Provost, &c., of Edinburgh* (4); *Dudley, &c., Electric Traction Co. v. Corporation of Dudley*. (5)

*Levett, K.C.*, and *Northcote*, for the respondents, contended that upon the true construction of s. 46, sub-s. 1, of the *Hamilton Gasworks Act, 1895*, the subject-matter which the respondents were thereby authorized to purchase was the gasworks and plant, and that those words do not include the goodwill and powers of the appellants' undertaking as a going concern. The appellants at the date of the purchase had no exclusive or any authority to

J. C.  
1910  
HAMILTON  
GAS  
COMPANY,  
LIMITED  
v.  
HAMILTON  
CORPORATION.  
—

(1) [1893] 1 Q. B. 375; [1893] A. C. 489.

A. C. 444.

(4) [1894] A. C. 456.

(2) [1893] A. C. 511.

(5) (1907) 96 L. T. 340; 97 L. T.

(3) [1894] 2 Q. B. 189; [1894] 556.



J. C.  
1910  
HAMILTON  
GAS  
COMPANY,  
LIMITED  
v.  
HAMILTON  
CORPORATION.  
—

supply gas as claimed. The Act of 1895 conferred the only right which they possessed, which was not in perpetuity, but subject to the respondents' right of purchase after twelve years. Immediately on the purchase the appellants' rights ceased. It was unnecessary in any view of their right for the respondents to purchase it. They already possessed under the Municipal Corporations Act, 1886, the statutory right to supply the gas in question, and had no need to acquire the appellants' limited right under their Act of 1895. Besides, s. 46, sub-s. 2, is inconsistent with the appellants' contention. It required the respondents to pay a further sum in addition to the purchase price in case the profits derived from the gasworks did not reach an average of 10 per cent. per annum. That assured the company against loss by means of a definite payment and, it was contended, precluded the view that goodwill was to be bought or its value taken into consideration in fixing the price. They also relied upon the reasons contained in the judgments of the Supreme Court.

Counsel for the appellants were not heard in reply.

1910  
March 18.  
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The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This appeal is made from a judgment of the Supreme Court of the Dominion of New Zealand of date February 26, 1909. That judgment was pronounced by that Court formally and in accordance with the opinion expressed by the Court of Appeal of that Dominion, so as, it is stated, to put the proceedings in proper form for the appeal to His Majesty in Council; and leave to appeal was given.

The judgment accordingly to be considered is that of the Court of Appeal. That judgment was pronounced upon a special case stated by Mr. Goldie, who, as umpire in an arbitration between the parties, made certain alternative findings with reference to the interpretation to be placed upon the term "gasworks and plant," which were being taken over by the corporation from the Hamilton Gas Company. Other points were submitted to the judgment of the Court of Appeal and settled by it, but these are not in controversy.

The alternative upon which a very large difference of valuation

depends is thus stated in the special case: "At the hearing the gas company contended that the price to be paid for the purchase of the gasworks and plant should be the commercial value thereof as a going concern, taking into consideration their present condition, rental value, earning power, and all surrounding circumstances, and not merely as on a sale of apparatus in situ and land and buildings, and that the arbitrators and umpire, in arriving at and determining such price, were entitled to capitalize the net annual profit or rental which, in their opinion, the gas company was, and might reasonably be expected to be, able and continue to earn and receive thereby and therefrom."

On the other hand, the position of the borough council is thus stated: "The borough council claimed that the price should be merely the value of the gasworks and plant regarded as gasworks and plant in situ capable of earning a profit, and that this value should be arrived at—(a) by taking the present value of the land and buildings and adding thereto what would be the present cost of the machinery and materials of a similar gasworks and plant and of placing such gasworks and plant in situ and making good the ground and deducting a sum for depreciation; or (b) by taking the cost of the land, buildings, gasworks and plant, and of laying down the gasworks and plant, and making good the ground, and deducting a sum for depreciation."

Being stated in the briefest terms, the controversy between the two parties is accordingly this—whether the gasworks and plant should be treated as merely the material thing or as truly the undertaking for which that thing existed. This alternative, however, produces great difference in the amount of the award arrived at, and their Lordships are not surprised to observe the care with which the case has been considered by the learned judges of the Court of Appeal. Such an alternative has not infrequently been presented in previous cases, which seem to have been fully under the consideration of that Court. Their Lordships, however, are of opinion that each of these cases and also the present case depended and depends, not upon any rule or principle of law of general application, but solely and entirely upon what is the just construction of the language, whether of statute or agreement, regulating the measure and nature of the

J. C.

1910

HAMILTON  
GAS  
COMPANY,  
LIMITED  
v.  
HAMILTON  
CORPORATION.

J. C.  
1910  
HAMILTON  
GAS  
COMPANY,  
LIMITED  
v.  
HAMILTON  
CORPORATION.  
—

claim. Illustrations might easily be given of this fact, as, for instance, the decision in the case of *Stockton and Middlesbrough Water Board v. Kirkleatham Local Board*. (1) In that case a water board constituted by a special Act was bound, when so required, to sell to the sanitary authority the mains, pipes, and fittings belonging to the board within that district. It was held, upon a construction of certain statutory provisions, and upon the terms above quoted, that the sum to be awarded was merely as a price for the mains, pipes, and fittings themselves, and not as a compensation for the loss of statutory rights of supply as a revenue-earning undertaking. The case was treated purely as one of construction, and the same method of treatment appears in *Toronto Street Ry. Co. v. Corporation of the City of Toronto* (2) and the other cases cited in the Court of Appeal. In none of these did the decision invoke any general principle whatever, except that the language employed by the parties must be carefully looked to in order to attach to it its accurate meaning.

Much reliance was placed by counsel for the respondents upon the view that language such as “gasworks and plant” must, in the first instance, be given only its primary and natural meaning, that is to say, a meaning which is confined to the material thing and not to the business or undertaking without which that thing would disappear. In this connection the language used by Lord Watson in *Edinburgh Street Tramways Co. v. Lord Provost, &c., of Edinburgh* (3) was referred to and with perfect propriety relied on. It is as follows: “I see no reason to doubt that these words ‘the tramway’ are capable of being so employed as to indicate that they embrace the use and occupation of the fabric as well as the fabric itself, or even to indicate that they apply to the whole stock and goodwill of a tramway undertaking. But in their primary and natural sense the words appear to me to denote nothing more than the fabric of the tramway lines upon which traffic is conducted. In order to give them a wider meaning, as they occur in the enumeration of particulars to be valued under s. 43, I think it is incumbent upon the appellants to shew, by

(1) [1893] A. C. 444.

(2) [1893] A. C. 511.

(3) [1894] A. C. 471.

reference to their context or to the general scheme of the statute, that they were intended by the Legislature to have that wider significance."

Lord Watson had already classified the right of property in a tramway line as possibly of three different degrees (1), stating that "although physically the subject is the same, the interest in it, which must be regarded as the true subject of valuation, is very different in these three cases."

Their Lordships do not think further reference to the authorities would carry the matter beyond the point stated.

On August 30, 1895, the Act of New Zealand, 59 Vict. No. 1, was passed. It is an Act "to enable the establishment of gasworks at the town of Hamilton, in the provincial district of Auckland, to supply the said town and its suburbs with gas." Under that Act Henry Atkinson, of the city of Auckland, received statutory power to construct and maintain gasworks, with all the incidental powers of breaking up streets and the like. Certain provisions are made with regard to the area of supply and its possible extension, and in general it may be said that the Act makes the usual provisions, which would permit of the establishment of gasworks, with powers of extension of the area to be supplied, and all the provisions usual in such cases.

By s. 44 it is provided that, should the profits exceed 15 per cent. on the capital invested, a rateable reduction was to be made in the price of gas furnished, so as to ensure to Mr. Atkinson "a profit as near as may be to the prescribed rate."

By s. 45 provision is made for annual balance-sheets, shewing receipts and expenditure and the total amount of capital invested. A copy of the balance-sheet was to be deposited with the borough council, and Mr. Atkinson, upon demand, was bound to produce to the borough council all his books of account and vouchers, so that the balance-sheet might be verified.

Then follows s. 46, the first two sub-sections of which are in these terms:—

"(1.) The Hamilton Borough Council shall be entitled, at any time after the expiration of twelve years from the date of the

J. C.

1910

HAMILTON  
GAS  
COMPANY,  
LIMITED  
v.  
HAMILTON  
CORPORATION.

(1) [1894] A. C. at p. 469.



J. C.  
1910  
HAMILTON  
GAS  
COMPANY,  
LIMITED  
v.  
HAMILTON  
CORPORATION.

coming into operation of this Act, to purchase the gasworks and plant, at a price to be determined by arbitration.

“(2.) If the said Henry Atkinson shall not have received profit from the gasworks equivalent to an average of 10 per centum over the whole period from the date when gas shall first be supplied from the gasworks until the date when the purchase by the Hamilton Borough Council is completed by payment of the purchase money, then the arbitrators shall add to the price assessed as aforesaid a sum which, together with the profit actually received by the said Henry Atkinson, would be the equivalent of such average annual profit of 10 per centum; but, in arriving at such equivalent, interest upon income shall not be computed.”

In support of the argument that “the gasworks and plant” fall to be construed as merely the works in situ capable of earning a profit, and not as equivalent to the gasworks undertaking, stress was laid upon two facts—first, that the scheme of the Act was shewn by sub-s. 2 to be to secure for Mr. Atkinson, as, it may be, a speculative undertaker, an assured profit of 10 per cent. from the date when gas was first to be supplied until the expiration of the twelve years, when the option of taking over by the corporation would come into effect. It was argued that this assurance of profit, plus the guarantee for the full value of the material, gasworks and plant themselves, threw light upon the scheme of compensation and restricted the amount to be awarded by the arbitrator under the head of “gasworks and plant” accordingly. On the other hand, it was argued that the provision of making up profits to 10 per cent. applied solely to the past.

In their Lordships’ opinion, the stipulation in sub-s. 2 as to making up profits to 10 per cent. does not afford any real assistance in the construction of the term “gasworks and plant” employed in sub-s. 1, and for this simple reason, that sub-s. 2 provides that the difference of profit is to be added “to the price assessed as aforesaid,” that is to say, to the price to be assessed for gasworks and plant in sub-s. 1. In short, the making up of profit to 10 per cent. forms no part of the elements or principle of ascertainment of the price, but is expressly stated to be an addition to the price when it is ascertained.

It was further argued that the gas company had no franchise of supply or undertaking in the sense of either monopoly or goodwill to dispose of, because of the limitations under which they stood by the Act of Parliament, they being liable to be bought out and taken over at the expiry of twelve years from the date of the Act. Their Lordships think that this argument would have had much weight if the gas company had been incorporated with a twelve years' life. In the present case, however, this was not so. Circumstances might have so shaped themselves in the town and district as to make it unwise for the corporation to take over the scheme of gas supply, and the company as undertakers might have been left—and, had the profit been small or dwindling, probably would have been left—for an indefinite period undisturbed. Such were the risks incident to the undertaking itself. Furthermore, the option to take over the undertaking at the end of twelve years was only open to the corporation upon terms, and those terms were to make payment of a price, not definite, but to be ascertained by arbitration. It does not appear to be legitimate to introduce as a principle of assessment of such a price the fact that the corporation were to acquire at a price to be assessed by arbitration.

These matters have been dealt with thus fully so as to clear away elements which were carefully dealt with in the arguments presented, and appear to have been treated as material by the learned judges of the Court of Appeal. In their Lordships' view, however, they are not of assistance.

While the position of the gas company is measured by the language of the statute, it is true to add that the position of the corporation must also be looked at in the light of their powers of acquisition. At the time of the passing of the Act of 1895 referred to, the Municipal Corporations Act in operation in New Zealand was the statute of 1836 (50 Vict. No. 50). Under the section of that statute applicable to lighting, provisions were made for the purchase by town councils of private gasworks theretofore constructed in boroughs and for the sale by gas companies of their private undertakings to corporations. Sect. 369 is to the following effect:—

“The council may, out of any moneys which may be applied

J. C.  
1910  
HAMILTON  
GAS  
COMPANY,  
LIMITED  
v.  
HAMILTON  
CORPORATION.  
—

J. C.  
1910  
HAMILTON  
GAS  
COMPANY,  
LIMITED  
v.  
HAMILTON  
CORPORATION.

to the construction of gasworks under this Act, purchase any gasworks theretofore constructed in the borough; and such gasworks shall, when so purchased, be deemed to be constructed under this Act.

“Where gasworks are at any time established for the supply of gas in any borough under the authority of an Act of the General Assembly, it shall not be lawful for the council to establish any other gasworks to supply the same locality or any part thereof except under the authority of a special Act in that behalf.”

It is important to note that, while town councils are thus permitted to purchase “gasworks” without any reference to the scope of that term as in the full sense of the undertaking itself, no doubt is left upon the scope of the term when the correlative section, dealing with what gas companies were to sell to the borough, is reached. That section is 370, and it is in the following terms:—

“The directors of any gas company, in pursuance, in the case of a company registered under ‘The Companies Act, 1882,’ of a special resolution of the members passed in manner provided by that Act, and in the case of any other company of a resolution passed by a majority of three-fourths in number and value of the members present, either personally or by proxy, at a meeting specially convened, with notice of the business to be transacted, may sell and transfer to the corporation of the borough, on such terms as may be agreed on between the council and the company, all the rights, powers, and privileges, and all or any of the lands, premises, works, and other property of the company, but subject to all the liabilities attached to the same at the time of such purchase.”

It thus has become very plain that, had the corporation of Hamilton attempted to exercise its general powers under the statute law of New Zealand for the acquisition of the Hamilton Gasworks, there could have been no doubt that they would have bought not only the works themselves in the material sense, but all rights, powers, and privileges in connection therewith, and that, on the other hand, so strong were these rights, powers, and privileges that the corporation were prohibited from

establishing rival works in the same locality or any part thereof, except after obtaining the authority of the Legislature to do so by a special Act. The corporation accordingly were apprised of the wide scope of the term "gasworks" so far as the general law of New Zealand as to the acquisition of such works was concerned. On the other hand, the Hamilton Gas Company were apprised of the same fact, and in these circumstances it appears to their Lordships that, if a more limited signification of the term was to be introduced by the Hamilton Act of 1895, such limitation should plainly, and could easily, have been made in language which would have excluded either monopoly, goodwill, or undertaking as such, from being included within the term "gas works and plant" employed. One limit to the profit-earning power of the undertaking does appear in the Act, namely, that its profits could never be declared at more than 15 per cent.; any balance that might, so to speak, be earned over that figure was by anticipation drawn off for the benefit of the community in relief of the price of gas. Below that figure and down to nil or a loss—all these considerations going to its value—were elements for the arbitrator in ascertaining the price to be paid under s. 46, sub-s. 1. At the price so determined the corporation could acquire, and to that price so determined the addition, if any, as to just profits provided for in sub-s. 2 fell to be made.

In their Lordships' opinion, accordingly, the decision of the Court below on the point submitted in this appeal was wrong, and they will humbly advise His Majesty that the appeal should be allowed and that the answer to the question (*a*) put by the umpire in the special case should be that the price to be paid for the gasworks and plant and to the appellants is the sum of 31,382*l.* 7*s.*

The respondents must pay the costs of the appeal.

Solicitors for appellants: *Herbert Smith, Goss, King & Gregory.*

Solicitors for respondents: *Murray, Hutchins, Stirling & Co.*

J. C.

1910

HAMILTON  
GAS  
COMPANY,  
LIMITED  
v.  
HAMILTON  
CORPORATION.  
—



## [PRIVY COUNCIL.]

J. C.\*  
 1910  
 Feb. 24;  
 March 18.

CORPORATION OF THE CITY OF TORONTO APPELLANTS;  
 AND  
 TORONTO RAILWAY COMPANY . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Ontario Act 8 Edw. 7, c. 112, s. 1—Construction and Effect.*

An Order in Council in pursuance of the judgment of their Lordships ([1907] A. C. 315) ordered that subject to certain conditions contained in their agreement it was for the respondents and not the appellants to determine what new lines should be laid down on streets within the city of Toronto.

Thereafter an order was made by the Ontario Railway and Municipal Board that the respondents construct between ten and fifteen additional miles of single track, and the company selected certain streets for that purpose. Subsequently the Court of Appeal for Ontario affirmed a decision of the said Board that the company had the right to select:—

*Held*, that the judgment in [1907] A. C. 315 was perfectly clear and that the Order in Council thereon was unaffected by Ontario Act 8 Edw. 7, c. 112, s. 1.

APPEAL from a judgment of the above Court (September 20, 1909) dismissing an appeal from an order of the Ontario Railway and Municipal Board (December 8, 1908).

The question was as to the right of the appellant corporation to prevent the respondent company constructing and operating tracks for the purposes of its railway upon such streets of the city as it might select. In 1907 the Privy Council decided this question in favour of the respondents. Thereafter the Ontario Legislature enacted the statute 8 Edw. 7, c. 112, s. 1 of which is set out in their Lordships' judgment; and, upon being notified of the respondents' intention to construct and operate their railway upon certain streets selected by them, denied their right to do so without the previous consent of the appellants and approval of their engineer.

The respondents applied to the said Ontario Board, and obtained a declaration that they had the right to construct

\* *Present*: LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and LORD SHAW OF DUNFERMLINE.

their railway upon the streets in question, and that the appellants had been guilty of a breach of their agreement with the respondents in refusing to give the necessary approval of the proposed plans, and enjoined the appellants from doing any act to prevent the respondents from constructing the said lines of railway.

J. C.  
1910  
TORONTO  
CORPORATION  
v.  
TORONTO  
RAILWAY.

The Court of Appeal affirmed this order.

*Eldon Bankes, K.C.*, and *W. E. Middleton, K.C.*, for the appellants, contended that the judgment in [1907] A. C. 315 was based upon the provisions of 55 Vict. c. 99, the respondents' incorporating Act, and not upon the agreement scheduled to the Act. The rights conferred upon the respondents by the Act were wider than those conferred by the agreement, and the respondents' absolute right to select the streets on which to operate was held to follow from the exclusive right to operate given by s. 4 of the said Act. In support of this contention reference was made to a shorthand note of the arguments employed by the respondents' counsel in that case. The effect of s. 1 of 8 Edw. 7, c. 112, was to vary the Order in Council which was based upon the judgment in [1907] A. C. 315. The corporation had no power to grant the exclusive right claimed: see Municipal Act, R. S. O., 1887, c. 184, s. 527; Street Railway Act, R. S. O., 1887, c. 171, s. 4, sub-s. 1. Sect. 1 of 8 Edw. 7, c. 112, in effect declared that the Act 55 Vict. c. 99 did not extend the rights of the respondents under their agreement, that no intention to do so existed, and that the parties' rights should be ascertained from a construction of the said agreement. Under that construction the respondents had no right, even if the appellants had the power to grant it, to construct lines at their own will and pleasure and in complete disregard of the wishes of the municipality. Reference was made to *Toronto Railway v. Toronto Corporation*. (1)

*Sir R. Finlay, K.C.*, and *D. L. McCarthy, K.C.*, for the respondents, contended that the Act 8 Edw. 7, c. 112, s. 1, amending the Act of incorporation, was unnecessary and beside the point. It does not in any way affect the rights of the parties under their

(1) [1906] A. C. 117, 119.

J. C.  
1910  
TORONTO  
CORPORATION  
v.  
TORONTO  
RAILWAY.

agreement, which gave the respondents the exclusive right to operate which necessarily involved the right of selection in dispute. The Court below rightly appreciated the judgment in [1907] A. C.

[They were stopped by their Lordships.]

*Eldon Bankes, K.C.*, in reply.

1910  
March 18.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is a singular appeal and, in their Lordships' opinion, a very idle one. In form it is an appeal from an order of the Court of Appeal for Ontario dismissing an appeal from an order of the Ontario Railway and Municipal Board. In substance it is an attempt to avoid or impugn an Order of His Majesty in Council and to reopen a question finally determined in a litigation between the parties to the present controversy—the city of Toronto and the Toronto Railway Company.

It seems that in the year 1891 the city of Toronto acquired the ownership of the railway of a former street railway company. The city advertised the railway with a new franchise for sale by tender. The tender of certain persons who proposed to become the purchasers was accepted, and on September 1, 1891, an agreement of sale and purchase was executed by the city and the purchasers. To this agreement the conditions of sale were annexed and made part and parcel thereof.

In April, 1892, an Act of the Parliament of Ontario was obtained (55 Vict. c. 99) incorporating the purchasers as the Toronto Railway Company, authorizing the company to purchase the railway, and confirming the agreement of September 1, 1891, which was scheduled to the Act together with the conditions of sale and the tender.

Questions afterwards arose between the city and the railway company, and among them a question as to which of the two had the right to select the streets for new lines when further accommodation was required in order to cope with increasing traffic.

These questions came to be the subject of litigation between the city and the railway company. Ultimately, on the advice

of this Board, upon an appeal from the Supreme Court of Canada, His Majesty was pleased, among other things, to declare and order that, subject to the said conditions of sale, it was for the railway company, and not for the city engineer with the approval of the city council, to determine what new lines should be laid down on streets within the city as existing at the date of the said agreement and what routes should be adopted by the railway company.

On May 17, 1907, on an application by the city against the company in a case commonly called "the Overcrowding Case," the Ontario Railway and Municipal Board ordered the company to construct between ten and fifteen additional miles of single track.

Proceeding to comply with the order of the Board, the company selected certain streets. These streets, as appears from the finding of the Board, had at one time been approved by the city engineer. The city, however, did not approve of the recommendations of their own engineer, taking up the position that the company had no right to build on streets, even when recommended by the city engineer, unless those streets were also approved by the city council.

While this controversy was pending, the city procured the insertion of the following clause in an omnibus Bill promoted by them, which passed into an Act on April 14, 1908, and is now the Act 8 Edw. 7, c. 112:—

"1. Notwithstanding anything contained in the Act passed in the fifty-fifth year of the reign of Her late Majesty Queen Victoria, and chaptered 99, and intituled An Act to incorporate the Toronto Railway Company, and to confirm the agreement between the Corporation of the City of Toronto and George W. Kiely, William Mackenzie, Henry A. Everett, and Chauncey C. Woodworth; and notwithstanding any judicial decision interpreting the effect of the said Act and the said agreement, it is hereby declared that it is and always has been the true intent and meaning of the said Act that the rights retained by and secured to the Corporation of the City of Toronto by the said agreement as to the control and management of the streets of the said city, and as to establishing and laying down new lines

J. C.

1910

TORONTO  
CORPORATIONv.  
TORONTO  
RAILWAY.



J. C.  
1910  
—  
TORONTO  
CORPORATION  
v.  
TORONTO  
RAILWAY.  
—

of railway, and as to extending the street car service upon the streets of the said city, as may be from time to time recommended by the city engineer and approved by the city council, have not been and are not affected by the said Act, but said rights remain and are as set out in the said agreement scheduled to the said Act."

The preamble of the Act contains recitals in reference to other matters dealt with in the Act, but it is silent as to the object of clause 1. It is difficult to understand the purpose of that clause. At first sight it looks as if it were aimed at His Majesty's Order and the advice tendered by this Board on the occasion of the former litigation. If that were indeed the aim, the bolt is very wide of the mark. In effect it seems to be nothing more than the affirmance of a proposition with which the railway company were never concerned to quarrel and with which they now profess to be in complete accord.

The next step was that the railway company made an application to the Railway and Municipal Board to have it declared that the railway company had the right to construct its railway upon the streets which it had selected and which were specified in the application.

On this application, which was opposed by the city, the Railway and Municipal Board determined that the company had the right to select the streets mentioned in their application, and so declared. They found that the city had denied the company's right and had prevented the company from using the streets selected for their new lines and had violated and committed a breach of the agreement which they made with the company. And so, under the authority vested in them by s. 63 of the Ontario Railway and Municipal Board Act, 1906, having regard to all the circumstances of the case, they thought it reasonable and expedient in their discretion to enjoin and restrain the city, their servants and agents, from preventing or interfering with the construction by the company of the railway upon the said streets mentioned in the application. A formal order to this effect was passed under the seal of the Board.

From this order the city appealed to the Court of Appeal for Ontario. The appeal was dismissed with costs.

On the hearing of the application to the Railway and Municipal Board, on the appeal to the Court of Appeal of Ontario, and on the hearing of this appeal, some reliance was placed on behalf of the city on the enactment contained in the Act of 1908.

The argument on the part of the appellants appears to be mainly founded on a shorthand note of some extracts from the speeches delivered by counsel on the hearing of the former case, a line of argument which their Lordships are not prepared to follow or disposed to countenance.

The judgment in the former case seems to be perfectly clear, and the Order of His Majesty is unaffected by the legislation of 1908.

Their Lordships will therefore humbly advise His Majesty that the appeal must be dismissed.

The appellants will bear the costs of the appeal.

Solicitors for appellants : *Freshfields.*

Solicitors for respondents : *Harrison & Powell.*

J. C.  
1910  
TORONTO  
CORPORATION  
v.  
TORONTO  
RAILWAY.

[PRIVY COUNCIL.]

CLARA B. JONES AND ANOTHER . . . . PLAINTIFFS ;

AND

NORTH VANCOUVER LAND AND IMPROVE- }  
MENT COMPANY, LIMITED LIABILITY. } DEFENDANTS.

J. C.\*

1910

Feb. 25 ;  
March 18.

ON APPEAL FROM THE SUPREME COURT OF BRITISH  
COLUMBIA (FULL COURT).

*British Columbia Companies Acts, 1890, 1892—Forfeiture of Shares—Alleged  
Irregularities in Call and Forfeiture.*

In an action by the appellants, being husband and wife, for a declaration that 240 shares in the respondent company standing in the name of the wife but of which she had executed a transfer to the husband (on the back of the certificate) had not been validly forfeited by the company, and that the husband was owner thereof and entitled to be registered as such, it appeared that the husband was a director of the

\* *Present* : LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and LORD SHAW OF DUNFERMLINE.

J. C.  
 1910  
 ~~~~~  
 JONES
 v.
 NORTH
 VANCOUVER
 LAND AND
 IMPROVE-
 MENT
 COMPANY.
 —

company, a party to the resolution of the board making calls on the said shares and to the subsequent resolution declaring them to be delinquent and forfeited, and that notice dated May 22, 1895, of the call of that date and of the liability to forfeiture if unpaid was mailed by the secretary to the wife's address in Vancouver, being the address given by her husband in all proceedings connected with the company from 1891 onwards (no address being registered or given on the certificate):—

Held, that the plaintiffs had by their conduct disentitled themselves to the relief prayed for; that the notice fulfilled all the requirements of the Canadian Companies Act, 1890, s. 35, and the 9th and 10th by-laws of November 5, 1891; and that any objections to the absence of due formalities in the service on the husband of acts to which he was a party, and to the illegality of the allotment, calls, and forfeiture of the shares due to technical irregularities in the original appointment of the husband and others as directors, must be disallowed.

APPEAL from a judgment of the Supreme Court (Hunter C.J. dissenting) affirming a judgment of the trial judge, Clement J., who dismissed the action.

The action was brought on May 27, 1907, under the circumstances stated in the judgment of their Lordships, for a declaration that the plaintiff Clara B. Jones was the owner of 240 shares in the defendant company and that the same had not been validly forfeited by their resolution dated June 25, 1898. The defendant company was incorporated on July 28, 1891, under the British Columbia Companies Act (c. 6 of 1890), amended by Act 7 of 1892. The grounds on which invalidity was alleged though not pleaded were substantially as follows: (1.) That there was no sufficient evidence that notice of the call was posted, or that the postage was prepaid or that the notice was properly addressed. It was not alleged that it was not received. (2.) That neither the directors who made the call nor those who passed the resolution of forfeiture were duly elected. (3.) That a previous call of \$15 per share had been irregularly made in December, 1892, and that the plaintiff H. A. Jones, the then registered holder, having paid that irregular call, the plaintiff Clara B. Jones was entitled to credit for the amount against the call of \$2.50 on which the forfeiture was based. (4.) That the resolution declaring the forfeiture was ineffective because, though it correctly recited the default in respect of 240 shares of which the plaintiff Clara B. Jones was the holder, it proceeded, by what

was proved to be a clerical error, to forfeit "the said 100 shares." (5.) That the right to forfeit had been waived by the directors making further calls on these shares after the default and before the forfeiture. None of these calls had been paid. (6.) That no time was limited by the by-laws for the payment of the call, as it was contended was required by the statute.

The company, while contending that the forfeiture was in itself regular and valid, put forward the further case that in any view the plaintiff Clara B. Jones was precluded from taking advantage of any of the irregularities alleged. The plaintiff H. A. Jones was a director throughout the material period of the company's existence, fully cognizant of all the proceedings which were attacked. The company also contended that he had recognized the forfeiture as regular and allowed the remaining shareholders to come forward upon that footing and advance money which saved the company when its prospects were bad. It was further contended that the plaintiff Clara B. Jones could not under the circumstances which existed be in any better position than her husband.

Clement J., without deciding whether any of the alleged irregularities would have invalidated the forfeiture, held that the plaintiffs had by their acts agreed to acquiesce in it and waive their rights to the shares.

Hunter C.J. in appeal held that the forfeiture was invalid on the ground that the directors acting in May, 1895, were not elected by ballot, that the call then made was made at an adjourned meeting, and that the resolution of forfeiture was invalidated by the clerical error above mentioned. He further held that there was no intention on the part of the plaintiff Clara B. Jones to abandon the shares and no estoppel. Irving J. agreed with Clement J. Morrison J. was of opinion that the forfeiture was valid in itself, and, further, that the plaintiffs purposely abandoned the shares when the company was in jeopardy.

Martin, K.C., for the appellants, contended that the forfeiture relied upon by the respondents was illegal and void. He referred to *Johnson v. Lyttle's Iron Agency* (1); Act 6 of 1890,

(1) (1877) 5 Ch. D. 687.

J. C.
1910
JONES
v.
NORTH
VANCOUVER
LAND AND
IMPROVE-
MENT
COMPANY.

J. C.
1910
JONES
v.
NORTH
VANCOUVER
LAND AND
IMPROVE-
MENT
COMPANY
—

ss. 3, 5, 11, 12, 13, 29, 32, 33, 35; and to Act 7 of 1892, s. 1. He objected that, besides the irregularities in the notices and in the resolution of forfeiture as stated above, the acts of the directors were void throughout owing to the illegality of their appointment. After the first three months had expired of the company's existence no trustees were elected as provided by s. 11, but five directors were elected on November 6, 1891, but not by ballot. The meeting of November 6, 1891, was not called after fourteen days' notice as required by the by-laws (see s. 11), for the by-laws were only passed on November 5, 1891. Those by-laws, moreover, were void, having been passed by trustees whose term of office had already expired. No valid by-laws were in existence till November 1, 1895, and so the call made on May 21, 1895, was illegal or at any rate insufficient to support a forfeiture under s. 35. Moreover, it was made by a board not elected by ballot but elected at a general meeting of shareholders not properly summoned, and having previously adjourned without a quorum. Further, the defence that Clara B. Jones had abandoned the shares was neither pleaded nor proved. They were recognized as belonging to her up to November 4, 1907, by the resolution of forfeiture of that date. Subsequently she had offered to pay up the calls. Reference was made to *Lindsay Petroleum Co. v. Hurd* (1); *Aaron's Reefs, Ltd. v. Twiss* (2); *Garden Gully United Quartz Mining Co. v. McLister*. (3) Moreover, abandonment is caused by refusing to pay calls because you do not think it advantageous to do so; not so when the refusal is due simply to inability to pay: see *Cooper v. Phibbs* (4); *Cockerell v. Cholmeley*. (5)

E. P. Davis, K.C., and *Rowlatt*, for the respondents, contended that the objections to the election of directors, to the resolutions of call and forfeiture, and to the notices were frivolous, had been waived, and were such that the plaintiffs, one of them having been a director at all material times, were precluded from making. The evidence shewed that the plaintiffs abandoned the shares as forfeited at a time when the fortunes of the company

(1) (1874) L. R. 5 P. C. 221.

(3) (1875) 1 App. Cas. 39.

(2) [1896] A. C. 273, 295.

(4) (1867) L. R. 2 H. L. 149.

(5) (1830) 1 Russ. & My. 418.

were extremely depressed. They allowed other persons on that footing to advance money in order to enable the company to continue their operations. They are not entitled to resume those shares when they have become valuable by reason of such advances. Reference was made to *Prendergast v. Turton*. (1)

Martin, K.C., in reply.

The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from the judgment of the Supreme Court of British Columbia, dated June 7, 1909, affirming the judgment of the trial judge, Clement J., who dismissed the action with costs. The suit, considering the relationship of the parties (they are husband and wife), and the conduct and action of the male plaintiff, is somewhat peculiar in its incidents.

It was originally commenced on May 27, 1907. The original statement of claim set forth that the plaintiff Clara B. Jones was the wife of the plaintiff H. A. Jones, a real estate agent, both residing in the city of Vancouver, in the province of British Columbia; that she was, since September 26, 1893, owner of 240 shares of \$100 of the capital stock of the defendant company, for which their certificate No. 237, dated September 26, 1893, was issued; that she held these shares in trust for him, and had by assignment (dated the same September 26, as it turns out) assigned all her estate and interest in the shares to him; and further alleged that the defendant company had wrongfully and illegally declared the shares to have been forfeited, and had persisted in so treating them, and claimed the following relief:—

(1.) That it might be declared that the shares had not been forfeited; and

(2.) That the plaintiff H. A. Jones might be declared to be the owner of the shares, and to be entitled to be registered as such.

To this statement of claim the defendants filed a defence alleged to be substantially identical with the amended defence, alleging amongst other things that the forfeited shares were in reality the property of H. A. Jones; that the calls made during the three years from May 21, 1895, to May 26, 1898, were unpaid,

(1) (1841) 1 Y. & C. Ch. 98.

J. C.

1910

JONES

v.

NORTH
VANCOUVER
LAND AND
IMPROVE-
MENT
COMPANY.

1910

March 18.

J. C.
1910
—
JONES
v.
NORTH-
VANCOUVER
LAND AND
IMPROVE-
MENT
COMPANY.
—

though notice had been duly given to Clara B. Jones of that fact, and of the intended forfeiture; and that H. A. Jones had been present at a meeting of the directors, of whom he was one, on June 29, 1895, when a resolution was passed that the shares registered in his wife's name with others should be declared delinquent, and that he himself had seconded a resolution that all necessary arrangements should be made to sell the same to pay the delinquent assessment.

On January 8, 1908, he was examined on discovery, and stated in effect, if not expressly, that these shares were assigned by him to his wife to protect him from his creditors, and identified a letter of his to the company dated August 28, 1906, containing the following passage:—

“Under these conditions I do not think it was either just or fair of the company to try to cancel my stock, although the same was held in trust for me by Mrs. Jones, as any liability I was under to the company was more than offset by the amount due for the services mentioned, and I trust you will arrange this matter, giving me credit for the amount due, thus placing the stock in its proper condition in your company.

“Trusting you will favour me with a reply in regard to this at your earliest convenience,

“I am, yours very truly,

“H. A. Jones.”

Five days before this, namely, on January 3, 1908, the statement of claim was amended. The husband was practically suppressed. The wife is stated to be the owner of the stock, and the relief prayed is simply that it may be declared that the shares have not been forfeited. At the trial it was stated by Mr. Martin, K.C., that H. A. Jones had been made a plaintiff by mistake; that a motion had been made to strike out his (Jones's) name from the record; that this was ordered to be done on the terms of his paying some costs which he had incurred; that he had refused to pay these costs, and therefore remained a party to the record. In his examination at the trial he endeavoured, however, to set up the new case, which was obviously resorted to in order to escape from the consequences of his (Jones's) own

action in being party to and approving of all the steps which had been taken to forfeit these very shares. The defence was that the house in which they lived, and which was their home, really belonged to his wife, Clara B. Jones; that she had consented to this house being mortgaged to obtain money to pay for these shares, and that thereupon he assigned them to her to be held as her own; but on the certificate being produced it was seen that on the back of it was an assignment to the husband, dated the very day the certificate was obtained.

It is in their Lordships' opinion clear that the second story is an afterthought, as the trial judge and the Supreme Court have in effect found it to be; that Clara B. Jones's name was, as it has been styled, a mere *prête-nom*; that her husband was the real owner of these shares; and that, even if through some informality it should appear that the shares were not legally forfeited, his right to the relief he seeks, or his wife, his alter ego in this action, seeks for him, must, having regard to the history of the company and the vicissitudes through which it passed, be determined with reference to his own conduct and his own participation in its affairs.

The company was incorporated on July 28, 1891, under the provisions of a British Columbia statute called the Companies Act, 1890 (6 of 1890), which latter Act was amended by c. 7 of 1892. Its head office was at Vancouver. It was formed to carry on a most speculative and risky business—jobbing in real estate. Its first meeting was held on November 6, 1891. It was then proposed by H. A. Jones, and seconded by one J. Wulffsohn, (1.) that five persons, of whom the proposer and seconder were two, should be directors for the ensuing year; (2.) that the subscribed stock be \$150,000, of which \$25,000 had been paid up, and that certificates be issued accordingly; and (3.) that two calls be made, the first at 2 per cent., on December 1, 1891, and the second one of 25 per cent. of the subscribed capital on January 1, 1892.

The prospects of the company were apparently fair at first, for on January 27, 1892, a resolution to the following effect was passed: "In view of the fact that the property since it was purchased has risen in value \$100,000, it is resolved that

J. C.
1910
JONES
v.
NORTH
VANCOUVER
LAND AND
IMPROVE-
MENT
COMPANY.
—

J. C. \$250,000 stock be issued to the shareholders upon which
1910 \$150,000 be paid up."

—
JONES
v.
NORTH
VANCOUVER
LAND AND
IMPROVE-
MENT
COMPANY.
—

From the company's formation down to September 26, 1898, H. A. Jones was a shareholder of 250 shares; from thenceforward of ten shares. From 1891 to 1902 he was an active director. He attended almost every meeting, and proposed and seconded resolutions calling up 47 per cent. of the capital. He then transferred 240 shares to his wife, retaining ten, as he said, to enable him to be a director.

It is quite apparent from the minutes of the meeting of July 23, 1894, and subsequent meetings, that the financial difficulties had begun, which culminated seven or eight years afterwards in great embarrassment not far removed from insolvency.

On May 21, 1895, a meeting was held at which H. A. Jones was present, when a resolution was proposed and carried unanimously to the effect that a call be made of \$2.50 per share on the stock of the company; that any stock on which this call should remain unpaid on June 29, 1895, should be declared delinquent and be sold by auction on July 15 following, unless the call be paid in the meantime.

A notice of this resolution was on May 22 mailed by Johannes Buntzen, the secretary of the company, to "Clara B. Jones, Vancouver." This is the address given by her husband in all the proceedings connected with the company from 1891 onwards and in both the statements of claim. No address is given on the certificate of the shares.

On June 29 following another meeting of the directors was held, H. A. Jones being present, at which two resolutions were proposed and carried unanimously, the second being seconded by H. A. Jones. The first was to the effect that the shareholders whose names were set out in the list subjoined were defaulters to the amounts set opposite to their names respectively, and that their stock should be declared to be delinquent; and the second, "That the secretary be authorized to advertise the delinquent stock for sale by public auction on the 15th July then next, and to prepare conditions of sale and make all necessary arrangements for the proposed sale of the stock to pay delinquent assessments."

In that list the name of Clara B. Jones appears as an owner of 240 shares, the amount unpaid on which was \$600, and H. A. Jones as owner of ten shares, the amount unpaid on which was \$25. As appears from the minutes of the meeting of September 18, 1895, at which H. A. Jones was present, the shares of several shareholders, including Clara B. Jones, were offered for sale on July 15 as directed, and again at adjourned sales on August 5 and September 3, but as no bids were made the stock was withdrawn from sale.

At this time it was reported to the directors by their president that owing to the failure of a portion of the shareholders to pay up their assessments the company had not been able to pay its taxes and was obliged to get an extension of time, and the president had agreed to pay \$500 in advance upon his shares to discharge the debt. H. A. Jones was present at this meeting.

Such were the difficulties of the company that H. A. Jones himself proposed on behalf of a correspondent to purchase the property of the company at \$150 an acre, and this was accepted on certain terms but never carried out. On March 13, 1896, another call of \$6 per share was by resolution, seconded by Jones, made on the capital of the company, with a threat that if the shareholders failed to pay their shares should be declared delinquent and be sold on Saturday, July 4, 1896. On June 9, 1896, a resolution was, at a meeting of the directors, seconded by Jones that the shares upon which the call of 6 per cent. remained unpaid should be declared delinquent. Another resolution was proposed by Jones that legal proceedings be commenced against the holders not later than July then next.

In this list the name of Clara B. Jones appears as owner of 240, owing \$1440 for calls, and H. A. Jones as the owner of ten shares, owing \$60. It thus appears that H. A. Jones had no objection to propose and get passed resolutions that he and his wife should pay or that their shares should be declared delinquent and sold. That, however, was the only aid he gave the company in its difficulties. His assistance never sounded in money. Neither in his own character, nor when masquerading as his wife, did he ever pay sixpence of all the calls which subsequent

J. C.
1910
JONES
v.
NORTH
VANCOUVER
LAND AND
IMPROVE-
MENT
COMPANY.
—

J. C.
1910
~
JONES
v.
NORTH
VANCOUVER
LAND AND
IMPROVE-
MENT
COMPANY.
—

to September, 1893, he made on himself and others. These sales which Jones so persistently directed should take place proved entirely abortive, and at last, on May 26, 1898, at a meeting at which H. A. Jones was present, two resolutions were proposed and carried, the first reciting that the shares standing in the name of Clara B. Jones, amongst others, were on June 29, 1895, declared delinquent in respect of this levy of \$2.50 per share levied on May 21, 1895, and further reciting that these shares had been offered for sale on September 3, 1895, but there was no bidding, whereby it was resolved that notice in a certain form should be served upon the shareholders requiring payment on or before June 24, 1898, after which if no payment were made the shares should be forfeited.

And the second was similar in character, dealing with the call of 6 per cent. made on March 13, 1896.

On May 27, 1898, F. J. Procter, the then secretary of the company, posted to the same address a letter of which the following is a copy:—

“The North Vancouver Land and Improvement Company,
Limited Liability.

“Head Office, Vancouver, B.C.

“519, Hastings Street,

“27th May, 1898.

“Madam,—The \$600.00 payable by you on the 240 shares numbered from 1751 to 1990 both inclusive, held by you in the North Vancouver Land and Improvement Company, Limited Liability, in respect of the assessment of \$2.50 per share levied on the 21st day of May, 1895, and notified to you on the 22nd day of May, 1895, still remaining unpaid, the said 240 shares held by you were on the 29th day of June, 1895, duly declared delinquent.

“Notice is now given that you are hereby required to pay the said sum of \$600.00 to E. Mahon, the president of the company, at the company's head office, Room 5, Thompson-Ogle Block 519, Hastings Street, Vancouver, B.C., and that unless the said sum of \$600.00 is paid as aforesaid on or before the 24th day of June, A.D. 1898, the shares whereon such payment is not made

will be liable to be forfeited at any time thereafter before payment.

“By order,

“F. J. Procter, Secretary.

“To Clara B. Jones, Vancouver, B.C.”

The receipt of this letter by Clara B. Jones is admitted. On June 25, 1898, a meeting of the directors was held, at which Jones was present. A resolution was proposed, reciting that Clara B. Jones was on May 21, 1895, holder of 240 shares in this company; that the board of trustees duly levied an assessment of \$600 upon the said shares; that on June 29, 1895, this sum remaining unpaid, the said shares were by the resolution of the trustees declared delinquent; that the said delinquent shares were on December 3, 1895, offered for sale, but that no bid was given; that the assessment remaining unpaid, the trustees resolved that the notice subsequently given on May 27, 1898, should be given, and the said 100 shares were declared forfeited to the company, to be the property of the company, to be disposed of in manner provided by the by-laws of the company. The number “100” is an obvious error for 240. That is plain from the earlier recitals, and any persons having to construe the document would naturally and properly read it so. An attempt appears to have been made to correct this error since action brought. It was, in their Lordships’ opinion, entirely unnecessary. Whoever else might have been misled by the erroneous number, H. A. Jones obviously was not; for it appears from a memorandum in the minute-book at foot of the resolution that he objected to the forfeiture and offered to pay \$100, and that the president thereupon said, “Pay by all means and we will be glad to get the \$100.” Jones, however, declined to pay unless the directors gave him an assurance that the stock would not be forfeited for six months, and that being refused, the stock was declared forfeited. Jones by this offer was obviously dealing with all the shares, not with 100 of them. On June 1, 1899, a meeting of the directors was held, at which Jones was present. The president reported the then condition of the share list. Under the heading of forfeited shares appears the name of Clara B. Jones for 240 shares. Until these

J. C.

1910

JONES

v.

NORTH
VANCOUVER
LAND AND
IMPROVE-
MENT
COMPANY.

J. C.
1910
JONES
v.
NORTH
VANCOUVER
LAND AND
IMPROVE-
MENT
COMPANY.
—

240 were forfeited, calls were made upon them as they were on the register, when made on others; but no notice of the making of these calls was given to the plaintiff or his wife in reference to these shares, nor any demand made in respect of them.

The embarrassment of the company steadily increased. In the year 1906 it had difficulty in keeping its head above water. It was only saved by some of the directors coming to the rescue and advancing their own money to pay its debts. From January, 1902, onwards H. A. Jones apparently took little interest in it. He lay by. He, in truth, left it derelict; not even rendering the poor but accustomed service of proposing resolutions that others should pay calls which he himself refused to pay. It has weathered the storm. Its shares are becoming valuable. And now, twelve years after this call of \$600 was made in respect of the 240 shares which are really his, nine years after they were in his presence, despite his efforts to save them, declared to be forfeited without his wife or he himself ever having protested against what was done, or paid sixpence in respect of the debt they owed the company, he brings this action complaining, in effect, that notice of what were really his own acts was not served with all the due formalities upon himself, and, worst of all, that he and his co-directors were illegally appointed, that everything they did was void ab initio, that consequently the shares they allotted were not legally allotted, the calls they made were wrongly made, and, as a consequence, that the money paid in respect of them might be required to be refunded; complaints which, if they could be sustained, would necessarily involve the affairs of this company in inextricable confusion, and might possibly bring about its insolvency. A proceeding more unmeritorious, more cynically audacious, could not well be conceived, even if the notices given were, in fact, defective in form, which, in their Lordships' opinion, for the reason hereafter stated, they are not, or if the service of these notices were irregular, which their Lordships think it was not. The principles laid down in *Prendergast v. Turton* and by Lord Lyndhurst on the appeal (1), and in the line of cases which followed it, fortunately it would seem, in the interest of

(1) (1841) 1 Y. & C. Ch. 98; (1843) 13 L. J. (N.S.) (Ch.) 268.

that honesty and fair dealing which ought to regulate the conduct of commercial affairs and the management of companies such as this, are strong enough to defeat such mischievous designs. These authorities shew that the plaintiffs must in this case be held to have by their own conduct disentitled themselves to the relief they pray for.

Their Lordships are of opinion that the notice sent by Buntzen, the secretary, on May 22, 1895, fulfilled all the requirements of the 33rd and 35th sections of the Canadian statute, the Companies Act of 1890, and the 9th and 10th of the by-laws of November 5, 1891, which were operative when it was sent. It stated the fact that the call had been made, the place at which after an interval of twenty-two days it should be paid, and gave the warning that if the call was not paid on or before the day named the shares would be deemed delinquent. This notice was in the words of the 9th by-law mailed to the nominal shareholder Clara B. Jones. Sect. 35 of the statute provides that if the call be not paid within the time thus fixed by the notice prescribed by the by-law No. 9, i.e., fourteen days, the trustees may forfeit the shares.

The best that can be said of the objections to the service of this notice is that they are frivolous.

The notice was not sent to Clara B. Jones's registered address or the very sufficient reason that she had no registered address. It was sent, however, to her husband's then address. This has remained his address from 1891 and is still the address of both as given in the pleadings. There is no suggestion in the case that they were living apart, so the natural and reasonable conclusion from the evidence is that they were living together. His address was therefore her proper address, and a letter or circular addressed to her there is "properly addressed" within the meaning of the 10th of the above-mentioned by-laws.

Their Lordships are, therefore, of opinion that the decision appealed from was right, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants : *Blake & Redden.*

Solicitors for respondents : *Armitage, Chapple & Macnaghten.*

A. C. 1910.

3 Z

J. C.
1910
JONES
v.
NORTH
VANCOUVER
LAND AND
IMPROVE-
MENT
COMPANY.
—

[PRIVY COUNCIL.]

J. C.* BARTON DEFENDANT ;
 1910
 March 1, 18. LEMPRIERE PLAINTIFF.

AND

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Crown Lands Alienation Act, 1861, ss. 13 and 14—Construction—Contract of Sale of Conditional Purchases—Subject to the Provisions of Local Laws and Regulations.

In an action by a vendor to recover a forfeitable deposit from the purchaser (and stakeholders) on the purchaser's failure to complete, the latter pleaded that as regards two portions of the land sold the vendor did not disclose a title as against the Crown to mine thereon for minerals other than gold:—

Held, that he was not bound to do so and was entitled to a decree. The contract specified that the said portions were sold subject to reservations mentioned in the schedule and to the local laws and regulations affecting the same. Gold was reserved to the Crown as mentioned in the schedule; all minerals were reserved by force of ss. 13 and 14 of New South Wales Crown Lands Alienation Act, 1861 and on the true construction of the contract there was no express or implied obligation on the vendor to shew that they had been acquired under s. 13 rather than s. 14 so as to be convertible into mining lands on terms prescribed by the Legislature.

APPEAL from a decree of the Chief Judge in Equity of the above Supreme Court (May 29, 1908).

The action arose from a contract dated January 16, 1908, for sale by the respondent as vendor to the appellant as purchaser of a mining property in the Colony of New South Wales. Under the contract, which is sufficiently set out in their Lordships' judgment, the appellant as purchaser paid a deposit of 2500*l.* into the Commercial Banking Company of Sydney, Limited. The question arose whether the respondent as vendor had shewn a sufficient title to a part of the property described in the contract as "portions 45 and 46." It was common ground that the respondent could not give any title to the land except subject to

* *Present*: LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

a reservation to the Crown of all the minerals. The appellant contended that in view of the terms of the contract (which mentions in the scheduled description of the said portions that it is subject to a reservation of gold to the Crown, but makes no express reference to any other reservation) the respondent did not comply with the contract by shewing a title with all minerals (and not merely gold) reserved. The respondent contended that a provision in the contract that the sale was "subject to the local laws and regulations" imported that he was relieved from making any title in regard to minerals, since (in view of the nature of the respondent's rights in the land) the law provided no means by which the respondent could call for a grant of minerals from the Crown.

The form of the action was that the respondent vendor sued the appellant and the bank as stakeholder for a declaration that the bank was trustee for the respondent of the said sum of 2500*l.* and for an injunction restraining the appellant from applying for the same.

The Chief Judge held (see 8 S. R. N. S. W. 264) that, as no case of fraud or mistake was set up, the decision must turn on the true construction of the contract and in particular of the words "subject to the reservations mentioned in the schedule hereto and to the local laws and regulations affecting the same"; that the later words "local laws and regulations" could not be limited, as it was contended on behalf of the appellant, to laws and regulations other than reservations, nor could the two branches of the sentence be construed as mutually exclusive, but local laws and regulations must be understood as including all the provisions of such laws and regulations whether in the nature of reservations or not; and he held that the respondent as vendor had shewn a good title in accordance with the agreement.

C. E. Jenkins, K.C., and *Clauson*, for the appellant, contended that on the true construction of the contract the respondent was bound to shew a good title as against the Crown to acquire a right to mine for minerals other than gold on the two portions of land in question. The reservation in the schedule only specified

J. C.
1910
BARTON
v.
LEMPRIERE.

J. C.
1910
BARTON
v.
LEMPRIERE.
—

gold. The only way to assign any meaning to that specified exception was to read the contract as including all other minerals not specifically excepted by the local laws and regulations. The respondent acquired these portions under s. 14 of the Crown Lands Alienation Act, 1861, and therefore could not give the appellant a right to acquire title to minerals as contemplated by the contract: see Crown Lands Act, 1884 (48 Vict., No. 18), s. 7, and regulations made thereunder and under its amendments. In order to do so he should have shewn a title under s. 13, and as he did not do so the appellant's deposit was not forfeited.

J. R. Atkin, K.C., and *R. A. Wright*, for the respondent, contended that a good title had been shewn within the meaning of the contract. It was by virtue of local laws and regulations that the respondent had no present title to the minerals and no title to convert the portions in question into mining lands with the right to work minerals. No claim to such title could be made unless the reservation of gold in the schedule be construed as excluding all reservations of minerals prescribed by the local laws. The contract does not in terms limit the application of the local laws in that way, and there is no reason for implying such a limitation. The appellant, moreover, was well acquainted with the state of the title and could not have bought under any mistake. Reference was made to *Chippendall v. William Laidley & Co.* (1)

Jenkins, K.C., replied, referring to *Cato v. Thompson.* (2)

1910
March 18.
—

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. By an agreement dated January 16, 1908, Lempriere, the respondent, agreed to sell, and Barton, the appellant, agreed to buy several portions of land in New South Wales amounting in the aggregate to 1042 acres, which at the time belonged to a copper mining company in liquidation.

The agreed price was the sum of 10,000*l.* On the execution of the agreement, the purchaser in accordance with his contract paid down 2500*l.* as a forfeitable deposit. The balance was to be paid on June 30, 1908. Time was to be the essence of the contract. The purchaser failed to complete. The Chief Judge

(1) [1909] A. C. 199.

(2) (1882) 9 Q. B. D. 616, 618.

in Equity has declared the vendor entitled to the deposit which has been brought into Court.

The purchaser contested the vendor's claim to forfeit the deposit, and now appeals on the ground that the vendor himself was in default, alleging that he was and is unable to shew a good title in accordance with the conditions of the contract.

The property was particularly described in the schedule to the agreement. It comprised seven land grants, five mining conditional purchases, two special leases, and also one conditional purchase and one additional conditional purchase. For the present purpose there is no distinction between a conditional purchase and an additional conditional purchase. In the schedule the one is denoted by the letters C. P. and the other by the letters A. C. P.

It is not disputed that a good title has been shewn to all the portions of land comprised in the schedule except the two conditional purchases. They are described in the schedule as follows:

| Title. | Portion. | Area. | |
|------------------|----------|-------|----------------------------------|
| C. P. No. 130 | . 45 | 100A | } Gold reserved
to the Crown. |
| A. C. P. No. 139 | . 46 | 40 | |

The condition of the contract as to title was that the property was to be sold "free from incumbrances, but subject to the reservations mentioned in the schedule . . . and to the local laws and regulations affecting the same."

Conditional purchases take effect under the Crown Lands Alienation Act of 1861 (25 Vict., No. 1), ss. 13 and 14. If the land conditionally purchased is not within the area of a proclaimed goldfield, it falls under s. 13; if it is, it falls under s. 14. In both all minerals are reserved. The only difference is that land conditionally purchased under s. 14 is not convertible into a mining conditional purchase, while land conditionally purchased under s. 13 may be so converted on terms prescribed by subsequent legislation and regulations. In all dealings with Crown lands gold is reserved to the Crown.

It is admitted that the two conditional purchases specified in the schedule were effected under s. 14.

J. C.

1910

BARTON

v.

LEMPRIERE.

J. C.
1910
BARTON
v.
LEMPRIERE.

The only question is a question of construction. It is not suggested that there was any mistake or misrepresentation or that the purchaser was in any way misled by the conditions of the contract or otherwise. The appellant's case is that on the true construction of the contract the vendor was bound to shew title to the conditional purchases under s. 13. The point mainly turned on the words "gold reserved to the Crown." The learned counsel for the appellant admitted frankly that but for those words the appellant would be out of Court. But he contended that those words amounted to a plain declaration that the two conditional purchases specified in the schedule were purchases under s. 13, and so convertible on terms into mining conditional purchases; otherwise, he said, the statement "gold reserved to the Crown" would be idle and unmeaning. Their Lordships are unable to spell out of the words of the schedule, taken in connection with the language of the contract and the circumstance that the property had been used and would in all probability again be used for mining purposes, the meaning which the appellant attributes to them.

The learned Chief Judge was of opinion that a good title had been shewn in accordance with the contract and that the deposit of 2500*l.* was held in trust for the vendor.

"No case," he says, "is set up of fraud or mistake; the case was argued purely on the true construction of the contract and in particular of the words . . . 'subject to the reservations mentioned in the schedule hereto and to the local laws and regulations affecting the same'

the defendant contended, if I understood his argument rightly, that the words mean subject to the reservation of gold and to the provisions (not in the nature of reservations) of the local laws and regulations. I am unable to see why the latter words of the clause should be so restricted. There is nothing to shew that the two branches of the sentence are intended to be mutually exclusive. I think the fair meaning is subject to the reservation of gold and to the provisions (whether in the nature of reservations or not) of the local laws and regulations."

Their Lordships are of opinion that the decision of the learned

Chief Judge is quite right, and they will humbly advise His Majesty that this appeal ought to be dismissed.

The appellant will pay the costs of the appeal.

Solicitor for appellant: *Arthur Blackman*.

Solicitors for respondent: *Mellor & Co.*

J. C.
1910
BARTON
v.
LEMPRIERE.

[PRIVY COUNCIL.]

REGINALD PALMER GREVILLE AND ANOTHER DEFENDANTS;

AND

CRESPIN PARKER PLAINTIFF.

J. C.*
1910
March 1, 18.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand Property Law Act, 1908, ss. 93 and 94—Suit by Lessee on a Covenant to renew the Lease—Specific Performance—No Relief against Performance of Condition Precedent—Relief against Forfeiture on Breach of Covenant.

Held, that ss. 93 and 94 of the New Zealand Property Law Act, 1908, which provide for relief against forfeiture of a lease based on failure to perform a covenant, do not apply where the lessor is resisting specific performance of a covenant to renew conditional on the performance of its covenants. There is no provision therein which purports to grant relief against the performance of a condition precedent.

Where the evidence disclosed a persistent course of wilful neglect of his covenants by the lessee, *held*, overruling the Court below, that he could not enforce a covenant for an extended term expressed in the lease to be conditional on their performance. Even if there were jurisdiction to grant relief, the circumstances of the lessee's breach must be such as to found an equitable claim thereto.

APPEAL from a judgment of the Court of Appeal (March 29, 1909) reversing a judgment of Chapman J. (November 2, 1908) which dismissed with costs the respondent's action for specific performance of a covenant by the appellants to grant to him an extended term of his lease.

The trial judge dismissed the action on the ground of non-performance of covenants in the original lease, the performance of which up to the expiration of the term granted thereby was a

* *Present*: LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

J. C.
1910
GREVILLE
v.
PARKER.

condition precedent to the right of renewal. Those covenants were to maintain fences, to clear noxious weeds, and to manage farming lands properly. The Court of Appeal did not disturb the finding of the trial judge that the covenants had been broken, but reversed his decision upon a ground not taken in the Court below. This was that the appellants by refusing to grant a renewal and resisting the action for specific performance were enforcing a forfeiture by action or otherwise within the meaning of s. 94, sub-s. 1, of the New Zealand Property Law Act, 1908, and were not entitled to do so by reason of the fact that they had not given the appellants the notice required by that section. They declared that the respondent was entitled to specific performance and remitted the case to the Court below to frame and work out a decree providing, inter alia, for an inquiry what damages the appellants had sustained by the respondent's breaches of covenant.

The material parts of ss. 93 and 94 of the Property Law Act, 1908, are as follows :

Sect. 93. "For the purposes of the three next succeeding sections 'lease' includes an original or derivative under-lease, a grant securing a rent by condition, and an agreement for a lease where the lessee has become entitled to have his lease granted."

Sect. 94. "(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable by action or otherwise unless and until the lessor serves or sends by registered letter to the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, or in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach if it is capable of remedy, and to make reasonable compensation therefor in money to the satisfaction of the lessor.

"(6.) This section applies to any right or option to purchase any land when the purchaser is in possession of that land."

The covenant to renew relied on in argument was in these terms:

“Provided also and it is hereby further agreed and declared that if the lessee his executors administrators or assigns shall desire to take a renewed lease of the said premises for a further term of ten years from the expiration of the term hereby granted and of such desire shall prior to the expiration of the said term hereby granted give to the lessors or leave at their or one of their last known places of abode six calendar months’ previous notice in writing and shall pay the rent reserved hereby and perform and fulfil all and singular the covenants by the lessee contained in these presents up to the expiration of the term hereby granted the lessors their executors administrators or assigns will demise and lease to the lessee his executors administrators or assigns the said land and premises for the further term of ten years at the same yearly rental and subject to the same covenants and provisos (except this present covenant) as are herein contained.”

J. C.

1910

GREVILLE

v.
PARKER.

G. Cave, K.C., and *Tyrrell Paine*, for the appellants, contended that the respondent had under the covenant merely an option for renewal, which had not been converted into an agreement for a lease by the respondent merely giving six months’ notice to renew. Even if that were the effect of the notice it was by reason of the non-performance of conditions precedent not an agreement for a lease where the lessee had become entitled to have his lease granted within the meaning of s. 93. A Court of Equity would not have granted a decree for specific performance under the circumstances. The appellants were not seeking to enforce a forfeiture under s. 94, sub-s. 1, but to resist specific performance of an agreement by which, having regard to the respondent’s conduct, they were not bound. Sect. 94, sub-s. 1, only applies to breaches of covenant or condition contained in the lease or agreement under which the property is held which occur during the tenancy. It does not apply to breaches of any obligations antecedent to the tenancy to which the section relates. Reference was made to *Davis v. Thomas* (1); *Weston v. Collins* (2);

(1) (1830) 1 Russ. & My. Ch. Ca.
506.

(2) (1865) 34 L. J. (N.S.) (Ch.)
358; S. C. 13 W. R. 510.

J. C. *Finch v. Underwood* (1); *Bastin v. Bidwell* (2); *Shodroske v. Hadley*. (3)

1910
GREVILLE
v.
PARKER.
—

Holman Gregory, for the respondent, contended that on the true construction of the covenant in the original lease and of ss. 93 and 94, cited by the appellants, he was entitled to a decree for specific performance as prayed. The Appeal Court was right for the reasons assigned by them in their construction of those sections. Even if he had been guilty of breaches of covenant in that lease, he was still entitled to a decree for specific performance upon making compensation in money for any damages sustained by the appellants in consequence of those breaches.

Counsel for the appellants were not heard in reply.

1910
March 18.
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The judgment of their Lordships was delivered by

LORD COLLINS. This is an appeal from a decision of the Court of Appeal of New Zealand overruling a decision of Chapman J. in favour of the lessor in an action brought by the lessee claiming specific performance of a covenant in the lease to renew for a further term of ten years. The point for determination is thus stated by Edwards J., who delivered the judgment of the Court:—

“This is an action for specific performance of an agreement for a lease embodied in a proviso contained in a prior lease from the respondents to the appellant giving to the appellant an option of renewal, and a notice in writing electing to exercise such option, given by the appellant to the respondents pursuant to such proviso. The clause giving the option makes the observance by the appellant of his covenants contained in the lease by which the option is given a condition precedent to his right to a renewed lease. The defence raised is that the appellant was guilty of divers breaches of his covenants contained in the prior lease, and therefore he has not performed the conditions precedent on his part to his right to a renewed lease under the clause to which we have referred. The learned judge in the Court below has found that divers breaches of covenant

(1) (1876) 2 Ch. D. 310.

(2) (1881) 18 Ch. D. 238.

(3) (1908) 27 N. Z. L. R. (S. C.)
377.

on the part of the appellant have been proved, and has pronounced judgment in favour of the respondents.

“It does not appear to be necessary or profitable to discuss the evidence on this point or the finding of the learned judge in the Court below upon it. It is sufficient to say that in our opinion this Court could not disturb those findings without departing from the principles laid down in *Coghlan v. Cumberland* (1) and *Montgomerie & Co. v. Wallace James* (2), upon which we ought to act. These cases, in our opinion, must be treated as exhaustively laying down the rule upon this point. It may, however, be as well to remark that, with reference to the construction of the covenant as to the eradication of the shrub called ‘Tauhinu,’ we do not understand the learned judge in the Court below to have differed from the interpretation placed by this Court upon a similar covenant with respect to furze in *Smith v. Barnitt*. (3) Counsel for the appellant admit that, breaches of covenant having been established, the appellant, apart from recent legislation and the decisions of the Courts therein, could not maintain the action. They contend, however, that the protection of the Property Law Act, 1908, ss. 93 and 94, as interpreted by recent decisions is that the appellant is entitled to a decree for specific performance, making compensation in money for any damages sustained by reason of his breaches of covenant. . . . The question turns upon the construction of ss. 93 and 94 of the Property Law Act, 1908, under the head of ‘Forfeitures.’ Sect. 93 is merely an interpretation clause. It provides that for the purposes of the next three succeeding sections ‘lease’ includes an original or derivative underlease, ‘a grant securing a rent by a condition and an agreement for a lease where the lessee has become entitled to have his lease granted.’ The words ‘where the lessee has become entitled to have his lease granted’ in this definition have been interpreted by Mr. Justice Denniston in *Shodroske v. Hadley* (4) as meaning where the lessee has become entitled ‘to have his lease granted had there been no forfeiture.’ We think that this interpretation is correct.”

J. C.

1910

GREVILLE
v.
PARKER.

(1) [1898] 1 Ch. 704.

(3) (1893) 12 N. Z. L. R. 449.

(2) [1904] A. C. 73.

(4) 27 N. Z. L. R. (S. C.) 377—383.

J. C.
1910
GREVILLE
v.
PARKER.
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The Court throughout their judgment seem to attach no importance whatever to the question whether, assuming that they had jurisdiction to relieve against forfeiture based on failure to perform a covenant, performance of which was by its terms a condition precedent to the right to claim the extended term, there was anything in the circumstances of the breach to found an equitable claim for relief. Their Lordships are unable to find any such elements in the circumstances of the present case which seem to evidence a persistent course of wilful neglect on the part of the lessee. In view of this attitude on the part of the Court it is perhaps worth while to cite an observation of Romer L.J. where thoughtlessness on the part of a lessee or failure on his part to realize the gravity of the breach were urged as grounds for relief against forfeiture. He says in *Eastern Telegraph Co. v. Dent* (1): "The suggestion that it is ground for relief in equity against the enforcement by the landlord of his legal right that the tenant has committed the breach of covenant either through thoughtlessness or because he thought the breach unimportant has no foundation in principle or authority."

But their Lordships are not prepared to admit that the circumstances of this case did in fact bring it within the legislation of 1908. The lessors were not in fact seeking to enforce a right of re-entry or forfeiture, by action or otherwise, under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease. They had brought no action and were apparently willing to let the term run out by effluxion of time, and merely set up the failure of the lessees to perform a condition precedent as an answer to their claim for specific performance. The Court themselves admit that, apart from the special legislation which they rely upon, the failure to perform a condition precedent was a complete answer to the claim for specific performance. There are no words in s. 94 which in terms purport to enable the Court to give relief against failure to perform a condition precedent, and, in view of the admitted state of the law on this subject both at home and in New Zealand up to that date (see the cases cited by Chapman J.),

(1) [1899] 1 Q. B. at p. 839.

one would expect to find clear words used by the Legislature if it was intended to confer relief of so novel a character on persons not specially meritorious. But, so far from such being the case, the Court can only find a provision for relief against forfeiture by reason of failure to perform a condition precedent by reading it into the enactment by means of a rather bold *petitio principii* involving a heavy strain upon the natural meaning of the sentence. Thus, by construing the definition of lease above cited from s. 93, as it was construed by Denniston J., as meaning "where the lessee has become entitled to have his lease granted had there been no forfeiture," they give by intendment of law what the statute does not in terms enact, namely, that a person who, by failure to perform his obligation, is disentitled to have his lease granted is to be treated as though he had not become disentitled.

A little later in the judgment, the Court, after pointing out that the case of *Nash v. Preece* (1) is binding on the Court, invokes s. 25 of the Supreme Court Act, 1882, pointing out that under that section the Court may relieve against a forfeiture of any lease or of any right to purchase where the purchaser is in possession for the breach of any covenant, condition, or agreement if the Court is of opinion that such breach has been committed through accident or mistake. If that section has any bearing on this case it is difficult to see why such considerations might not be equally important here.

Their Lordships will humbly advise His Majesty that the appeal be allowed with costs here and below, and that the judgment of Chapman J. be restored.

Solicitors for appellants: *Paines, Blyth & Huxtable.*

Solicitors for respondent: *Blyth, Dutton, Hartley & Blyth.*

J. C.
1910
GREVILLE
v.
PARKER.

(1) (1901) 20 N. Z. L. R. (C. A.) 141.

[HOUSE OF LORDS.]

H. L. (Sc.) HENRY SCRYMGEOUR WEDDERBURN . . APPELLANT ;

1910

AND

April 7. THE EARL OF LAUDERDALE RESPONDENT.*Dignity—Jurisdiction—Non-alienability of Office of Standard Bearer of Scotland—Sale of Offices—Prescription—Scots Act 1455, c. 44.*

Held, that all heritable offices are not adjudgable, and that the office or dignity of Hereditary Royal Standard Bearer of Scotland being vested in the appellant's family by right of blood could not be carried by any decree of the Court of Session nor adjudged nor be lost to the appellant's family except under circumstances which had not occurred.

Held, therefore, that the respondent the Earl of Lauderdale had no right or title to the office or dignity of Hereditary Royal Standard Bearer of Scotland.

Decision of the First Division of the Court of Session reversed.

Cockburn of Langton's Case, (1747) Mor. Dict. 150 ; (1755) H. L. 1 Pat. App. 603, commented on. (1)

APPEAL by the defender from (inter alia) two judgments of the Court of Session dated November 29, 1904, and July 18, 1908. (2) Of these the first adhered to an interlocutor of the Lord Ordinary (Lord Kyllachy) dated December 13, 1902, repelling certain preliminary pleas of the appellant, but recalled his interlocutor dated July 1, 1903, deciding against the appellant. The First Division of the Court of Session (Lord President Kinross, Lords M'Laren, Adam, and Kinnear) recalled this interlocutor of July 1, 1903, and ordered a general proof. Against this judgment the appellant appealed only so far as it adhered to the opinion of the Lord Ordinary. Proof having been taken, the case was heard before the First Division of the Inner House (Lord President Dunedin, Lords M'Laren and Kinnear) at length in February and March, 1908, after which the Court took the case to avizandum till July 18, 1908, when the Court delivered the second material judgment appealed against.

(1) The extracts from charters in the notes appear as they were printed for the use of the House. The reporter and editor do not answer for their accuracy, and no attempt has been made to correct gram-

matical errors. Contracted words have occasionally been expanded, and one or two manifest misprints have been tacitly amended.

(2) (1905) 7 F. 1045 ; (1908) S. C. 1237.

The immediate facts of the case were these. In 1901-2 the appellant (who is a Scrymgeour in male line, the name of Wedderburn having been taken by his great uncle and later by his grandfather on succeeding to the Wedderburn estates in Forfarshire) and the respondent both petitioned the Court of Claims to be allowed to carry the Standard of Scotland at the coronation of their Majesties King Edward VII. and Queen Alexandra as Hereditary Royal Standard Bearer of Scotland. Similar petitions had been presented to Courts of Claims by a predecessor of the respondent in 1761 and by the predecessors of both the appellant and the respondent in 1820-21, but on all these occasions the Court postponed the claims and gave no decision. Thereafter at the coronation of King George IV. the respondent's predecessor, the eighth Earl of Lauderdale, did carry the Standard of Scotland by command of the King, but as a matter of grace, not of right, and in 1822 the appellant's grandfather attended the Court held at Holyrood as Hereditary Royal Standard Bearer. In 1876 Her Majesty Queen Victoria commanded the attendance of the appellant in Edinburgh as Hereditary Royal Standard Bearer at the unveiling of the statue of the Prince Consort by Her Majesty, and the appellant obeyed the command.

H. L. (Sc.)
1910
SCRYMGEOUR
WEDDER-
BURN
v.
EARL OF
LAUDER-
DALE.

Upon the matter coming before the Court of Claims in 1901-2 there was a further petition by the Reverend Ronald Cameron Scrimgeour, who suggested that he might be senior in descent to the appellant. The Court first heard the competing claims of the respondent and the appellant, and decided (January 15, 1902) that the right was vested in the family of Scrymgeour. The Reverend R. C. Scrimgeour then applied to the Court to postpone any further decision in order to enable him to endeavour to connect with the ancient family of the Scrymgeours of Dudhope, but the Court refused his application, and on May 14, 1902, gave the following judgment:—

“The Court considers that the right to the office of Hereditary Standard Bearer of Scotland is vested in the family of Scrymgeour, and that the petitioner Henry Scrymgeour Wedderburn has established a *prima facie* title to represent that family, and the Court adjudges that the claim of the said petitioner the said Henry Scrymgeour Wedderburn be allowed him to be exercised

H. L. (Sc.) on the day of their Majesties' coronation. And as to the petition of the said Earl of Lauderdale and the Reverend R. C. Scrymgeour it is considered and adjudged by the Court that the claim of the said petitioners and each of them to exercise the said claim at the said coronation be disallowed."

1910
SCRYMGEOUR
WEDDER-
BURN
v.
EARL OF
LAUDER-
DALE.

Thereafter the appellant was commanded by King Edward VII. to attend the proposed coronation on June 26, 1902, and, this being postponed, was again commanded to attend the coronation on August 9, 1902, and attended in Westminster Abbey and there carried the Royal Standard of Scotland. He also by Royal command attended as Hereditary Royal Standard Bearer the Court held by His Majesty at Holyrood in May, 1903. Meanwhile, on April 28, 1902, the respondent commenced this action against both the appellant and the Reverend R. C. Scrymgeour, the latter of whom did not enter any appearance. In this action the pursuer claimed (1.) a declarator that he had the only and undoubted right to the office of Standard Bearer of Scotland, and (2.) to interdict the defender H. Scrymgeour Wedderburn from interfering with him in the exercise of its duties and from calling himself Standard Bearer.

In the Court of Session the defender had pleaded in the first place certain preliminary pleas, in addition to that of *res judicata*, namely, that the action was not competent, especially as regards interdict, and that, the office of Standard Bearer being an honour, and also having regard to the action of the King, the Court of Session had no jurisdiction. The Lord Ordinary repelled these pleas, and the Court adhered to this judgment, as stated above. Upon the appeal to the House of Lords the claim to interdict was abandoned by the respondent, while the plea of jurisdiction was not argued, the decision of the House being given before the appellant reached that point. Lord Loreburn L.C., however, in delivering judgment stated that the office or dignity was wholly outside the jurisdiction of the Court of Session.

The appellant set out the history of the case as follows, which he alleged to be in accordance with tradition, and corroborated by documents: The office of Standard Bearer or the "Banner," together with a grant of arms and of the name of Scrymgeour (meaning Sharp Fighter), was originally conferred

by a King of Scotland—either Malcolm III. or one of the Alexanders—on one of his army as a reward for valour. In 1641 its then holder was raised to the peerage as Viscount Dudhope and Lord Scrymgeour as a “farther degree of honour” in addition to the “heretable title of King’s Standard Bearer,” which he and his predecessors already enjoyed. By an Act of 1594, c. 87, the office devolved upon a named series of heirs, whom failing on Sir James Scrymgeour’s heirs male whomsoever bearing the name and arms of Scrymgeour. By another Act of Parliament in 1600, c. 44 (1), it was enacted that the sole right of bearing all “his Hienes standertis” of whatever kind was vested in Sir James Scrymgeour and his heirs male. These

H. L. (Sc.)

1910

SCRYMGEOUR
WEDDER-
BURN
v.
EARL OF
LAUDER-
DALE.

(1) The Acts of the Parliament of Scotland (Rec. Ed.), vol. 4, p. 243, give this Act as follows—although other editions of the Acts which divided Public from Private or Particular Acts call it a “Particular Act,” c. 21:—Act 1600, c. 44: “Oure Souerane Lord and Estaittis of this pñt pliamēt Ratefeis appreves and Confermes the infetmentis richtis titillis and securiteis maid be his hienes and his maist nobill progenitouris of worthie memorie To his hienes weilbelouit Sr James scrymgeour of dudup knyt and his predecessouris of the heretable office of the bering of his hienes banner In all the pointis articlis and claussis thair of And willis and grātis and for his hienes and his successouris decernis and ordanis the said ratificaoun and cōfermaoun To be alsō gude valide and effectuell as gif all the saidis infetmentis richtis and securiteis wer at lenth registrat and insert heirinto Anent the omisoun quhair of his hienes with advyse fairsaid dispensis be thir pñtis And findis and declaris that the said Sr James scrymgeour of dudop knyt and his airis maill had and hes the onlie and Indoubtit heretable richt of the said office and of the beiring

of all his hienes banneris standertis cornettis pinsaillis handschenyeis vtheris signis and takinnis of battell and weir of quhatsumeuir collar schaip or fassoun baith on horsis and fute that hes bene displayit or sal happin to be displayit befor his hienes and his successouris at ony tyme heireftir And thairfor and for gude trew and thankfull service done be the said sr James and his predecessouris to his matie and his maist nobill progenitouris and to be done to his hienes and his successouris His hienes with advyse fairsaid hes of new gevin grātis and disponit And be the tenor of this pñt Act geves grantis and disponis To the said sr James scrymgeour of dudop knyt and his saidis airis maill berand the surname and Armes of scrymgeour the fairsaid office with all honouris landis feis dewteis privileges and Immunitis belanging thairto And expreslie annullis and dischargis all and quhatsumeuir infetmentis richtis titillis and securiteis purchest be ony vther psone or psones of the said office or ony pairt thair of without cōsent of the said sr James and his fairsaidis And declaris the samī to be of na force strenth nor effect in tyme cūmīg.”

H. L. (SC.)
 1910
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 SCRYMGEOUR  
 WEDDER-  
 BURN  
 v.  
 EARL OF  
 LAUDER-  
 DALE.

statutes of 1594 and 1600 have never been repealed, and all subsequent legislation relating to the office has been, according to the appellant, subject to the rights created by these Acts—"salvo jure cujuslibet." The respondent now set up four titles, namely, (1.) a gift of ultimis hæres, with a decree of declarator dated February 14, 1671; (2.) a gift of recognition; (3.) acquisition by apprising or adjudication; (4.) novodamus with grant of all rights (if any) in the Crown. As to these the appellant stated that the third Viscount Dudhope (also created in 1661 Earl of Dundee) died in 1668, not only without any issue, but admittedly without any near relatives in male line. Thereupon the appellant alleged that the Duke of Lauderdale, then all-powerful in Scotland, represented to the King that the Earl, having died without any heirs male within a given number of degrees of propinquity, had left therefore no heir male (a representation alleged to be unfounded in fact and in law), and, further, that there was no person who could succeed to him (which was also unfounded in fact), so that all his lands, baronies, and other property had fallen to the King as his last heir (ultimus hæres). The Duke, therefore, it was alleged, obtained of the King a gift of the estate of the late Earl in favour of his brother, Charles Maitland of Halton. (1) Thereupon by a charter dated July 11, 1670, it was recited that the King had granted to the said Charles Maitland the barony of Dundee, including various lands, "together with the offices of Constable of Dundee and of carrying the banner of our Crown, the coltsilver and customs of the first fair of Dundee," &c. The appellant alleged that in making this grant the King was deceived, and that the grant was therefore void. He also alleged that, upon obtaining this gift, Charles Maitland at once got an order from the Privy Council for the delivery up by the appellant's predecessor John Scrymgeour of Kirkton (who had on the death of the Earl entered into occupation of his house and estates) of all the titles and papers of the family, and thus became possessed of seven charter chests of such titles and papers. He further alleged that the greater part of these charters were then destroyed,

(1) Haltoun, Halton, and Hatton are equally right, as the name is spelt variously.

and that some have since been lost by the successors of Charles Maitland (the respondent's predecessor), so that upon a diligence granted by the Court (1) in the present action not more than the contents of a single chest was produced to the appellant as now in the custody of the respondent. The appellant also averred that the patents of the peerages of Dudhope and Dundee were destroyed, and that the pages of the register of the Great Seal, once containing inter alia (as the index proves) the patent of the viscounty of Dudhope, were removed from the—for this period otherwise perfect—register. On August 22, 1670, Charles Maitland proceeded to get a Ratification of his gift of ultimus hæres from Parliament (2), which passed, subject, however, to an Act salvo jure ejuslibet, c. 62. (3) It being necessary for the completion of a title as donatory of ultimus hæres to obtain a declaration of the King's gift, Charles Maitland now proceeded to the Court of Session, and on February 14, 1671, obtained the decree of ultimus hæres (4)

(1) (1905) 7 F. 1045.

(2) Vol. 8 Acts of Parl. of Scotland 44, "Ratification" of August 22, 1670, c. 49: "Our Sovereign Lord with advyce and consent of the Estates of Parliament hes ratified and approven and be thir presents ratifies and approves the wreits following viz.,—Ane chartor granted by His Mätie vnder his Mäties great Seale to His Mäties Councillor Charles Maitland of Haltoun his aires successors and assigneys here<sup>lie</sup> and irredimably of all and sundry the lands and baronys of Dundie Rossie Vlishaven and of all and sundry the lands of Balkilly Craig Hilfeild barony of Glaistry lands of Baldovan Balrudry Benvy advocations donations and ry<sup>ts</sup> of patronages and several other lands at lenth denominat designed and mentioned therintill all formerly belonging to the decest John Earle of Dundie And fallen and become in his Mäties hands and at His Mäties gift and disposition be reason that the infettments of the samen lands and

others therein mentioned wer given by His Mäties prediceors to the said deceased John Earle of Dundie and his prediceors and their aires male and that there is no lauff air mail that may succeid or be served as air male to the said vmquh John Earle of Dundie in the samen lands baronies mylnes teinds and others therein mentioned. . . ."

[Redundant capitals in the original have been disregarded.]

(3) Private Acts or Ratifications of private grants by the Scots Parliament as they passed of course without hearing those having interest could not hurt the right of third parties, for which reason they were declared subject to reduction by the Court of Session: see statute of 1567, c. 18, sess. 2. And all the sessions of the Scots Parliament downwards from James VI. (1603) were closed with an Act saving the right of third parties: Erskine, Principles, 1, 3, 3.

(4) Decreet of the Court of Session

H. L. (Sc.)  
1910  
SCRYMGEOUR  
WEDDER-  
BURN  
v.  
EARL OF  
LAUDER-  
DALE.



H. L. (Sc.) on which the judgment of the Court of Session now appealed against was founded. (1)

1910

SCRYMGEOUR dated 14 February 1671 in action at instance of Charles Maitland of Hattontone and Sir John Nisbet [King's Advocate] &c. against a John Scrymgeour, undesignated and called as apparent heir not as heir-male to the deceased John Earl of Dundee Lady Mary Scrymgeour sister to the said deceased Earl, John Scrymgeour of Kirkton, Lady Jean Scrymgeour Lady Fintry and John Graham of Fintry her husband, Robert Graham their son, Dame Anna Ramsay Countess of Dundee, relict of the said Earl, and Sir Harry Bruce of Clackmannan now her spouse for his interest, and all others having or pretending to have interest. The pursuer concluded for declarator that certain lands, baronies, &c., which he enumerated had been held under the Crown by the now deceased Earl of Dundee and his heirs male; that "yr now is no air mail nor persoun who can succed" to the said deceased Earl in the said lands, baronies, &c., "nor air mail to be served to him"; and that the said lands &c. have fallen to the King as last heir, and now pertain to the pursuer Charles Maitland as his Majesty's donatory. The pursuer enumerated, inter alia, the barony of Dundee containing . . . the office of Constabulary and Bannerbeirer Colt-silver and all customs of the first fair of Dundee. To prove that the said lands, baronies &c. did hold immediately of the Crown he produced a Crown charter of 11 December 1617 in which the tailie was limited to heirs male of Sir John Scrymgeour; but which did not in fact contain the Banner. To instruct his right to the subjects in question he produced the charter of 11 July 1670—he produced no gift on which that charter could have proceeded. The defenders

pleaded that there could be no declarator as the Earl's estates were held under an entail of 1587, which taillied the lands to a much wider destination and under which Scrymgeour of Kirkton was heir, and that if the entail was broken by the charter of 1617 it was renewed by a charter of 1643 the Royal warrant (signature) for which the pursuer had himself produced. The Court found for the pursuer on this point unless the defenders would positively allege that the entail was revived. In the course of the proceedings the defenders' counsel announced that they appeared for an Alexander Scrymgeour who as was alleged must succeed as heir male if the entail of 1587 were broken. On his behalf they craved an exhibition of "the said deceast Earle of Dundie his chairtour gift," and craved delay in the meantime. In reply to an answer by the pursuer to their petition they offered to condescend upon Alexander Scrymgeour's contingency of blood and that he was ninth from Blastilrie all by the male blood. To this the pursuer duplied that the reply was irrelevant. The Court repelled the reply in respect of the duply, and decerned against Alexander repelling his original allegiance [that he must succeed if the entail were broken] unless he condescend upon his contingency of blood and give in his statement of it to the clerk in the course of the afternoon. The defender's counsel then declared that they passed from their compareance and craved to be marked absent which the Court admitted of and pronounced a decree in their absence in favour of the pursuer.

(1) (1908) S. C. 1237.

The appellant alleged that this decree was *res inter alios acta* so far as the present parties were concerned. The decree further was not only founded in falsity (the King having been deceived in his grant), but was bad and invalid on the face of it. The "Banner," as the office of Standard Bearer is termed in the appellant's case, is only incidentally mentioned in a long preliminary enumeration of the items said to be embraced in the barony of Dundee, which barony was itself a mere item amongst several large landed estates. The appellant contended also that the decree could not override the Acts of 1594 and 1600, which are superior in force and quality to either charter or decree.(1) If the heirs male mentioned in the Act of 1600 had failed, the result would have been either to revive the Act of 1594 already mentioned, or to extinguish the office of the "Banner" and not to convert it into a piece of property capable of becoming caduciary. The decree declares, on the face of it, that the donatory Charles Maitland has received the lands and others which were the subjects of the alleged Royal gift, as these were contained in a charter in favour of Sir James Scrymgeour dated December 11, 1617. That charter contained the barony of Dundee and correctly enumerated all the items embraced in it. It contained no reference to the "Banner." The decree proceeds on Charles Maitland's assertion that "he would take up the charter produced (i.e., that of 1617) and would produce no more." The appellant therefore maintained that the

H. L. (Sc.)

1910

SCRYMGEOUR  
WEDDER-  
BURN  
v.  
EARL OF  
LAUDER-  
DALE.

(1) In the Court of Claims Lord Robertson said to Lord Lauderdale's counsel, "Have you any authority for saying that a public office conferred by statute without *salvo jure* is subject to the feudal casualties? It seems to me that under the Act of 1600 the law of Scotland is that Mr. Wedderburn is the Standard Bearer, and no number of charters will get rid of that unless you can shew that the Act of 1600 could be subject to the feudal casualties as the charters assume." Lord Robertson said further, "I have the greatest doubt at present whether the rule about *ultimus hæres* applies to an

office of this kind at all, and nobody in those proceedings in the Scottish Courts in the old times have ever said that it does."

Lord Robert Cecil. . . . "That may be, but in any case I submit it is immaterial to Lord Lauderdale's claim, and for this reason. The office was granted to Scrymgeour of Dudhope and his heirs male. If there was no heir male the office ceased completely."

Lord Robertson. "That is to say the grant was spent. There was no reversion of the grant to the Crown."

[Cited by Mr. Wedderburn, K.C., from shorthand notes.]

H. L. (Sc.)  
1910  
SCRYMGEOUR  
WEDDER-  
BURN  
v.  
EARL OF  
LAUDER-  
DALE.

charter of 1617 could not now be alleged by the respondent not to be the latest charter, and that the decree was thus limited to the subjects of the 1617 charter, and that of these the "Banner" was not one. The appellant alleged also that since the Act 1455, c. 44, the Crown was prohibited in Scotland from giving out offices in fee and heritage. There was also mentioned in the decree (as being embraced in the subjects of the Royal gift) the advocacy or patronage of the church and parish of Benvie. The appellant said that this right was—like the "Banner"—not included in the charter of 1617, and that the Court of Session decided in 1785 (1), in reference to this right of patronage, that it was outwith the scope of the decree, because not contained in the charter of 1617. Previous to the decree but after the charter of ultimus hæres Charles Maitland had obtained another charter (2), dated November 29, 1670, proceeding on a gift of recognition, and on July 5, 1673, he got a decree of declarator (in which, however, the "Banner" was not mentioned) of the recognition, and subsequently a parliamentary ratification *salvo jure*. In relation to this, the matter of Charles Maitland's titles to the estates of the late Earl of Dundee came before the Court of Session in 1687, when the creditors of the Earl

(1) Minute book of the Court of Session under date January 18, 1785.

(2) His charters were as follows: Charter of ultimus hæres under Great Seal, July 11, 1670: ". . . totas et integras terras et baroniam de Dundie contineñ . . . terras de Castelhill cum molendinis multuris et sequelis earundem officio constabularie et vexillum Corone nofe gereñ lie [this symbol is apparently equivalent to "Anglice"] Colt silver et omnes custumas primi nundini de Dundie . . ."

Charter of recognition under Great Seal dated November 29, 1670: "Una cum hereditario officio . . . et similiter hereditarium officium gerendi omnia nostra lie banners, standarts, cornettes, pincelles, ensigns aliaque signa lie tokines

guerre et belli de quocunque lie shap seu fashione seu colore tam pedestri quam equestri que coram nobis et successoribus nostris explicata erint seu explicanda fuissent quocunque tempore diem date pñtis carte nostre precedeñ cum omnibus honoribus, terris, feodis devoriis et immunitatibus eidem spectañ . . . quequidem . . terre (etc) nunc ad nos pertinent et in manibus nostris devenerunt et ad nostrum donationem et dispositionem ratione recognitionis et legibus dicti Regni nostri Scotiae et per privilegium nostre corone. . . Tenendas et habendas omnes et singulas predictas terras (etc) officium constabularie et vexillum nñum corone gereñ. . . Carolo Maitland de Haltoun ejusque antedict."

attempted to reduce the decree of recognition in order to make Maitland liable under his title of ultimus hæres for the debts of the Earl. In these proceedings Maitland denied that he had ever held the estates under his ultimus hæres title. In 1785, in the action by the Earl of Lauderdale against Lord Gray and the Officers of State (known as the *Benvie Case* (1)), Lord Lauderdale claimed the patronage or advocacy of the kirk of Benvie to be vested in him by virtue of the decree of February 14, 1671. Lord Gray, the defender, answered (inter alia) (*a*) that this gift of ultimus hæres, on which alone the Earl's claim was based, was obtained by obreption and subreption and was in itself void, was never completed or capable of being so, and was abandoned and laid aside for above a century; (*b*) that the Earl of Dundee did not die without heirs, but left both an heir male and heirs of line (i.e., his sisters); (*c*) that Charles Maitland had got a charter of recognition in place of that of ultimus hæres; and (*d*) that the decree of ultimus hæres could only apply to the subjects of the Scrymgeour charter of 1617, of which the patronage of Benvie was not one. The officers of State who appeared in the case argued in their pleadings that the patronage was either still in hereditate of the Earl of Dundee, whose heirs (they state) still exist, or fell as unclaimed to the Crown, and that the gift of ultimus hæres was null and void, both as proceeding on the falsity of "no heirs" and as never perfected by any declarator of the gift, in distinction from the charter. The present appellant contended that if the inclusion of the patronage in the decree of 1671 had been conclusive in favour of Lord Lauderdale in 1785, when the decree of 1671 had been unreduced for over a century, Lord Lauderdale's action must have succeeded. But the defender was assolized from it. Further, as to Lord Halton's alleged title by recognition, it was never completed as far as the "Banner" was concerned. The decree of recognition omitted all reference to the "Banner." The third title set up by the respondent was

H. L. (Sc.)  
1910  
SCRYMGEOUR  
WEDDER-  
BURN  
v.  
EARL OF  
LAUDER-  
DALE.

(1) (1785) Minute Book of Court of Session under date January 18, 1785. The pleadings in this case are given at great length in the

appellant's printed appendix, p. 294. See Campbell Coll. Sess. Papers, Advocates' Lib., Edinburgh.



H. L. (SC.)  
1910  
SCRYMGEOUR  
WEDDER-  
BURN  
v.  
EARL OF  
LAUDER-  
DALE.

that by apprising or adjudication. Charters were obtained by Charles Maitland May 25, 1672, and May 24, 1676 (1), purporting to be charters upon adjudication by creditors of the late Earl of Dundee. The charter of 1672 was ratified in Parliament September 11, 1672, c. 73, subject, however, to an Act *salvo jure* (1672, c. 148). The respondent, in default of any valid title as *ultimus hæres* or by recognition or adjudication, relied on a clause of *novodamus* in the charter of 1676, ratified by Parliament September 6, 1681, c. 72. This charter commuted the personal duties of the office into money payments; the ratification is also *salvo jure*, Act 1681, c. 192, and the appellant contended that neither it nor the charter affected the right of the Scrymgeours under the Act of 1600; for if it granted to Maitland any new right, that right was independent of the Scrymgeour right. Moreover, it was soon lost by Maitland, even if the grant was not in contravention of the Act of 1455. In 1684 Charles Maitland was deprived of all public offices and employments under the Crown and was ordered to deliver up all his Scrymgeour property within ten miles of Dundee. It appeared that thereafter no claim was made to the office of Standard Bearer till in 1750 the seventh Earl gave a bond to an Edinburgh writer, who thereupon as creditor charged him to enter heir to Charles Maitland (his great-grandfather), whose hereditas under the charter of 1676 the writer then adjudged; after which, in October, 1760, while this nominal creditor was still in possession, King George II. died, and thereupon the Earl took from his said creditor, the writer, an assignation to so much of the said adjudication as concerned the alleged office of the Banner as held under the 1676 charter. The Earl then obtained an Exchequer charter of adjudication of date February 23,

(1) Charter of adjudication and *novodamus* dated May 24, 1676, purporting to cite the terms of the Charter of John Baliol in 1302, and made it appear that the lands therein mentioned were granted to Alexander Scrymgeour, for services to be done in carrying the standard in the future; “pro homagio et servitio suo nobis et

successoribus nris facientẽ portando vexillum nřum.” The charter appeared also to recite another charter by Robert Bruce to Nicholas Scrymgeour in 1318 whereby the office of Constable of Dundee and certain lands were granted “faciendo inde . . . firram portando vexillum nřum in exercitu nřo pro omni servitio.”

1761 (1), and with this petitioned (August, 1761) the then Court of Claims for a summons to carry the Banner at the impending coronation of King George III. The charter contained the whole title, if any, to the Banner relied upon by the respondent. The Court of Claims postponed the claim. The appellant alleged that whatever the Earl acquired under the charter of 1761 was acquired by him as standing in the place of a creditor, and not as his heir. The respondent's title to the Banner was limited to adjudication, and the appellant said the Banner was not adjudicable. The Barons of Exchequer had no power either to substitute personal service to the King for the money payment of 1676 or to create a military holding in contravention of the Act of 1746-47. The eighth Earl in 1820 again presented the charter of 1761 to the Court of Claims then sitting in regard to the coronation of George IV. The appellant's grandfather also petitioned the Court. The claims of both petitioners were postponed. Thereafter, as stated above, the Earl of Lauderdale, in fact, carried the Standard at the coronation by the personal appointment of the King—by grace, not by right. Soon after (August 17, 1822), at a Court held at Holyrood by the same King, the appellant's grandfather was presented as Heritable Royal Standard Bearer in the presence of the Earl of Lauderdale, who raised no protest either then or afterwards. Subsequently the Earl obtained another Exchequer charter, dated December 20, 1824 (2), in place of that of 1761. Having resigned his alleged

H. L. (Sc.)  
1910  
SCRYMGEOUR  
WEDDER-  
BURN  
v.  
EARL OF  
LAUDER-  
DALE.

(1) By a charter of adjudication under the Great Seal dated February 23, 1761, the King granted and confirmed to the seventh Earl of Lauderdale and his heirs male and assigns "hæreditarium officium signiferi lie Banner-Bearer seu officium gerendi omnia nostra Insignia lie Standarts, coronetts, pencils, aliaque Insignia guerræ et Battallæ cujuscunque formæ figuræ vel coloris (etc). Quodquidem hæreditarium officium (etc) per prius hæreditarii pertinuerunt ad quondam Carolum Comitem de Lauderdale abavum dicti Jacobi nunc Comitis de Lauderdale Secundum

Cartam sub magno Sigillo nostro de data 24th May, 1676."

(2) By a charter of resignation under the Great Seal, dated December 20, 1824, the King granted the office to the Earl of Lauderdale, along with the family estates, with a clause of reddendo "pro dict. officio signiferi lie Banner Bearer cum privilegiis et immunitatibus cujusd. summam sex solidorum monetæ Scotiæ annuatim vice divoriarum et servitiorum (si quæ sint) debiti et solvi soli et consueti pro eodem per antiquas donationes jura et infeofamenta ejusd."

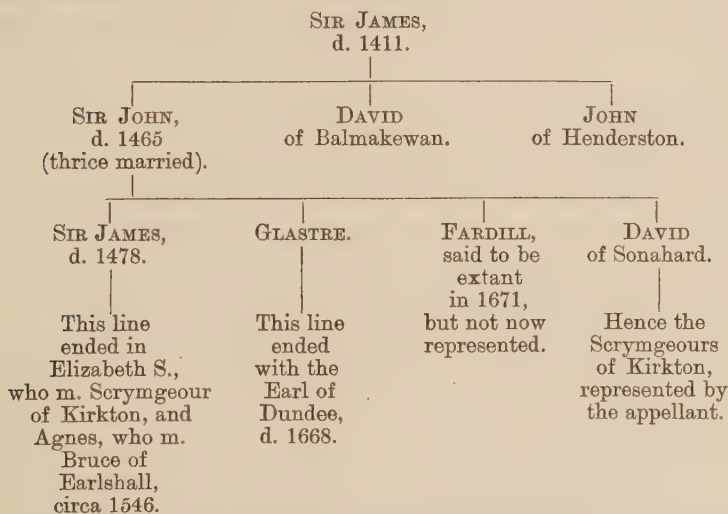
H. L. (Sc.) 1910  
 SCRYMGEOUR  
 WEDDER-  
 BURN  
 c.  
 EARL OF  
 LAUDER-  
 DALE.

office under his special charter of 1761 into the hands of the Crown, he received it again, thrown as a mere item into a general charter of confirmation of an entail of the Lauderdale family lands and baronies with a new reddendo, by which the Crown commuted all services of the Banner (if any) due by the Earl on his former title to an annual payment of six shillings Scots, i.e., sixpence sterling. No sasine was taken on the charter of 1824, but the fullest extent of the respondent's duties as Standard Bearer under it was to pay sixpence.

As to the appellant's pedigree, the appellant was admitted to be heir male of John Scrymgeour of Kirkton and as such heir of entail under the charter of 1587 and ratifying Act of 1594. He claimed that the Scrymgeours of Kirkton were a male branch of the house of Dudhope, and they were admitted to be descended of David Scrymgeour of Sonahard, who died in 1471. The sons of this David were called to the succession in a male entail of Scrymgeour property in 1479 made by the Standard Bearer of the time, and are there found placed between David Scrymgeour of Fardill, admitted to have been a son of Sir John Scrymgeour, Standard Bearer (who died in 1465), and the descendants of John Scrymgeour of Henderston, known to have been his brother. The appellant contended that it was thus shewn that David of Sonahard, if not a son of Sir John, was his brother. A retour, however, obtained by John Scrymgeour of Kirkton in 1610, finds him to be "*legitimus et propinquior hæres*" of the same Sir John (d. 1465), and this, it was contended, shewed that his descent was from Sir John and not from a brother of Sir John. David of Sonahard, therefore, was a son of Sir John. It is true that the John Scrymgeour who obtained the retour in 1610 was also descended from Sir John in the female line, through the marriage of his father's father (another John Scrymgeour, at one time of Ballegarno and later of Kirkton) with Elizabeth Scrymgeour, daughter of James Scrymgeour, Standard Bearer in 1540, and great-grandson of Sir John, who died in 1465; but that the retour of 1610 did not refer to that descent was (it was argued) shewn by the fact that in 1539 Elizabeth resigned paternal rights, and by evidence that in retours "*heir*" unqualified means heir through males. Thus by another retour

of the same date (1610) William Bruce, son of a sister of and co-heiress with Elizabeth, was retoured "*legitimus et propinquior hæres ex parte matris*" to Sir John (d. 1465). The place of the Kirkton branch before that of Fardill in the order of some of the male entails in 1541-42 and 1587 may be by promotion due to its nearer descent in the female line, but this female descent does not account for the admission of the Kirkton branch to those male entails. The descendants of the sister of Elizabeth, who married a Bruce, are not in any such entails. In 1671 it appeared that the Fardill branch were still extant, but even if they were senior to the Kirkton branch it was not averred by the respondent that they were extant now, and the succession had thus, as the appellant alleged, opened to the Kirkton family since the date of the decree of 1671. Much other evidence in proof of the appellant's pedigree was printed, but his descent from David of Sonahard being admitted, it was not discussed before the House.

H. L. (Sc.)  
1910  
SCRYMGEOUR  
WEDDER-  
BURN  
v.  
EARL OF  
LAUDER-  
DALE.



On July 18, 1908, the First Division of the Court of Session pronounced the following interlocutor: "Find and declare in terms of the conclusions of the summons and decern." That was in fact a decree of declarator in favour of the pursuer, now the respondent. (1)

(1) (1908) S. C. 1237. Note.—This question of interdict was not abandoned in the Court of Session.



H. L. (Sc.)      On the appeal being called on, both parties declared that they  
 1910      had no objection to the Earl of Halsbury and Lord Collins, who  
 SCRYMGEOUR      had sat in the Court of Claims (1), sitting to hear the appeal.  
 WEDDER-  
 BURN  
 v.  
 EARL OF  
 LAUDER-  
 DALE.

April 5, 6, 7. *Wedderburn, K.C.* (with him *J. H. Stevenson*, the latter of the Scottish Bar), for the appellant, argued as a preliminary point that the decision of the Court of Claims was final, and that in view of that decision the judgment of the Court of Session could not stand. They maintained (1.) that the Court of Claims had until the time of Henry VIII. been the Court of the Lord High Steward and must still be so considered: see Coke Inst. iv. 4; (2.) that although the King might have no power to establish a new Court to administer any other law than the common law—*In re Bishop of Natal* (2)—the Court of Claims was not a new Court, and acted according to the common law.

The House decided that the decision of the Court of Claims was not *res judicata*.

*Wedderburn, K.C.*, for the appellant, on the respondent's title as original pursuer then maintained—

The "Banner" was always an honour in the blood, and nothing has ever occurred to alter its character. It is neither a feudal subject, nor in commercio. The Acts of 1594 and 1600 do not feudalize it, and nothing but an Act of Parliament can do so. Thus on the death of the Earl of Dundee the Banner passed to his heirs male, who in fact existed, but even if he had had no heirs according to the limitations of either Act the grant would have been spent, and the Banner would have ceased with the blood of the grantee and would not have reverted to the King, since honours held *jure sanguinis*, e.g., peerages, are not caduciary. The Banner is akin to a peerage and governed by the same rules. Further, if the Banner is an office in fee and heritage and had fallen to the King, it could not have been

(1) Note.—Lord Kinross, who had sat, as above stated, on part of the case in the Court of Session, had also previously sat on it in the Court of Claims.  
 (2) (1864) 3 Moo. P. C. (N.S.) 152.

given out by him anew, by reason of the Act of 1455, c. 44 (1), which prohibited the giving out of such offices after that date. If the Banner is an honour, and not in commercio, it is not adjudicable, and if this is so, the respondent's titles based on the charters of 1761 and 1824 (which are founded solely on adjudication) fail altogether. The titles of Halton under his charters of adjudication of 1672 and 1676 also fail for the same reason, even supposing that the respondent is in right of those titles, which is not admitted. The title by recognition which Halton got does not in any case carry the Banner, as the Banner is omitted from the decree of declarator of recognition. The title of ultimus hæres alone remains. This was obtained in fraud of the King, as there were in fact heirs male. The King was therefore deceived in his grant and the grant is void: *Alcock v. Cooke*. (2) The theory on which the decree proceeded of the necessity for heirs within a given number of degrees never was the law of Scotland—1 M'Laren on Wills, 73, 80; Stair, iii., 3, 47; under which an heir of whatsoever degree has right. Moreover, there were in fact heirs of line, the Earl's sisters, and it is essential to a title of ultimus hæres that there should be no heirs: Stair, iv., 13, 1; 1 M'Laren on Wills, 80. Further, even if the heirs male under the Act of 1600 had failed, the only result would be to bring in the heirs of entail under the Act of 1594, under which the appellant is admittedly heir of entail. There is no inconsistency between the two Acts; on the contrary, the Act of 1600 (which does not proceed on any resignation) confirms the infeftments confirmed by the Act of 1594, i.e., the charter of 1587, under which the appellant is heir of entail. As to the adjudicability of the Banner, all hereditary offices are not adjudicable. One high military office akin to the Banner, namely, the office of Earl Marshal, has been held by the Court "to be annexed to the blood and not in commercio": *Bower*

H. L. (Sc.)

1910

SCRYMGEOUR  
WEDDER-  
BURN  
v.  
EARL OF  
LAUDER-  
DALE.

(1) Old Scots Act, 1455, c. 44: "That there be na office in time to cum given in fee and heritage and that the offices that are given sen the decease of our Soveraine Lorde, that deade is, be revoked and annulled

exceptand the wardanery of the Marche, the quhilk our Soveraine Lorde hes given to his sonne Alexander Erle of Marche and Lord of Annanddaile."

(2) (1829) 5 Bing. 340.

H. L. (Sc.) 1910  
 SCRYMGEOUR  
 WEDDER-  
 BURN  
 v.  
 EARL OF  
 LAUDER-  
 DALE.

v. *The Earl Mareschal* (1); and 1 Fountainhall, 98, lays it down that the Great Constablenesship of Scotland is not in commercio. Erskine's statement, Bk. ii. tit. 12, s. 7, that the Great Constablenesship was proved in the case of *Cockburn of Langton* (2) to have been transmitted from hand to hand is erroneous, as a reference to the documents relating to it used in the *Cockburn of Langton Case* (2) shews. In the *Cockburn of Langton Case* (2) the hereditary office of Chief Usher was held to be adjudgable, but the decision was reluctantly given (3), and though affirmed in the House of Lords (with no reasons reported) is not of high authority. The office of Chief Usher was very different to that of the Banner. It carried fees, was included in a barony, and was destined to assigns. (4) *Bower v. The Earl Mareschal* (5) is not overruled by the case of *Cockburn of Langton* (2), and if both are good law, it is necessary to decide in which category the Banner is. But as to the principle of the adjudgability of any offices there is much doubt. In *Wilson v. Falconer* (office of Keeper of the Register of Sasines) (6)

(1) (1682) 2 Brown's Supplement, 18; 3 *ibid.* 420. The Lords found the title of nobility and office of Marshall was annexed to the blood and not in commercio, and that the using the title and exercising the office of Marshall made no passive title.

(2) (1747) Mor. Dict. 150; Elchies, 384; (1755) 1 Pat. App. 603.

(3) In *Cockburn of Langton* the judges were of opinion that it was an irrational practice to subject offices, like this in question, to be distrained for debt. But then it was thought that the practice had gone too far to be altered; and that it might be of dangerous consequence to many who possess such offices by legal or voluntary conveyance to find this office not adjudgable. And for that reason they adhered to their former interlocutor (holding it adjudgable), the President (Lord Forbes of Culloden) alone differing.

(4) Ratification Act, September 2, 1681, c. 37.

(5) 2 Brown's Supplement, 18; 3 *ibid.* 420.

(6) (1759) Kames, Sel. Dec. 219; Mor. Dict. 167. Note. — Lord Kames said: "It seems clear that the office itself is not adjudgable. It was certainly not in the power of the Court of Session by means of an adjudication, or by any means to forfeit Falconer of his office and in his stead to name Marion Wilson, Keeper of the Register of Sasines. This power is inherent in the Crown and does not belong to the Court of Session. Next, to transfer the office to the creditor, is repugnant to the very nature of an adjudication, considered as a security only, which is the case during the legal . . . The question ought to be, not whether the office be adjudgable; but whether the emoluments be adjudgable. The office of the Keeper

Lord Kames was strongly of opinion that offices were not adjudgable, although the emoluments may be. In *Stewart v. Miller* (office of Deputy Clerk of the Bills) (1) the House of Lords by Lord Eldon expressed a strong view against the sale of offices, and no distinction can be drawn between offices for life and offices for a series of lives, i.e., hereditary offices. It is submitted that it is not desirable or necessary to extend the *Cockburn of Langton Case*. (2) If it was extended to all offices, the result would be that at the next coronation the Scottish offices of State might be let out for the day to wealthy foreigners. Further, Lord Robertson said in the Court of Claims that he had the greatest doubt whether the doctrine of *ultimus hæres* applied at all to such an honour as the Banner.

H. L. (Sc.)  
1910  
SCRYMGEOUR  
WEDDER-  
BURN  
v.  
EARL OF  
LAUDER-  
DALE.

*Sir Robert B. Finlay, K.C.*, and *Macphail* (the latter of the Scottish Bar), for the respondent. Many of the appellant's statements, especially with regard to his alleged descent and to the events of 1670, are entirely without foundation. The office of Standard Bearer is not a mere honour, but is a feudal subject and a heritable office, and as such is adjudgable. Many such offices have in fact been adjudged in Scotland, and that this was the law was clearly laid down in the only decided case, namely, *Cockburn of Langton*. (2) That case was later than the case of *Bower v. The Earl Mareschal* (3) and must be taken to have overruled it. The point on the Act of 1594 is new and there is no reference to it in the pleadings. The office of Standard Bearer itself was apprized in 1666 in the lifetime of the Earl of Dundee.

[LORD LOREBURN L.C. Do you mean to say that an office with a duty to fight against the King's enemies can be put up to auction on the bankruptcy of the holder?]

of the Register of Sasines being personal is not adjudgable. But the emoluments of that office may be adjudged. And if such adjudication be competent it follows that the deputy instead of accounting to Mr. Falconer for the emoluments must account to the adjudger. . . . It appears to me that wherever there is a power of deputation the emolu-

ments may be adjudged, however personal the office may be. Other-ways where there is no power of deputation which is the case of the supreme judges."

(1) (1802) 4 Pat. App. 286.

(2) Mor. Dict. 150; Elchies, 384; 1 Pat. App. 603.

(3) 2 Brown's Supplement, 18; 3 *ibid.*, 420.



H. L. (SC.)  
 1910  
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 SCRYMGEOUR
 WEDDER-
 BURN
 v.
 EARL OF
 LAUDER-
 DALE.

It used to be so. The office of High Constable of Scotland, which had been granted to the Earl of Erroll and the heirs male of his body, was conveyed to and enjoyed by singular successors by a charter of 1584, which granted the office to Francis Hay, second son of the Earl. That was as much an alienation as if it had been granted to any other person, and it was open to any creditor to come in and seize the office. Like other heritage it was also subject to prescription: see Lord Corehouse in *Macdonell v. Duke of Gordon*. (1) The Act of 1600 must be taken to have repealed the Act of 1594, and it is therefore incumbent on the appellant to prove himself an heir male of Lord Dundee. That Act of 1600 gave the grantee a title which was good against the world. But a man once he had obtained the office was not barred from disposing of it. Further, the grant being to heirs male only, the office passed to the Crown on their failure.

[LORD LOREBURN L.C. Where an office is to a man and his heirs male, how can he bar his heirs male?]

This is an office which by the law of Scotland is in commercio, and the rights of heirs in such an office may be defeated just as in the case of land. There is no distinction between the status of the office of Standard Bearer and that of King's or Parliamentary Usher. The printed papers in this House and in the Advocates' Library, Edinburgh, in *Cockburn of Langton's Case* (2), shew that the office of Usher was a very high one. Here the office being to heirs male only, the office passed to the Crown on their extinction.

[LORD LOREBURN L.C. Have you proved that there was no heir male existing in 1671?]

The decree of February 14, 1671, proves that Lord Dundee died without heirs male. It was open to the Scrymgeours who were defenders in that action to prove their pedigree then, and they did not do so. John of Kirkton, on whom the appellant relied, was not an heir male, but claimed to be heir of entail. The decree of 1671 at least shifts the onus of proof on to the appellant to prove the existence of such heirs then and now. Further, this decree

(1) (1828) 6 S. 600.

(2) Mor. Dict. 150; 1 Pat. App. 603.

bars the appellant from either criticizing the respondent's title or setting up his own, as it is binding on all claiming through the parties to it, of whom the appellant's ancestor, Scrymgeour of Kirkton, was one. The charter of apprizing carrying this office from the Scrymgeours to the Lauderdales was one of the instances brought to the notice of the Court in *Cockburn of Langton's Case*. (1)

H. L. (SC.)

1910

SCRYMGEOUR
WEDDER-
BURN
v.
EARL OF
LAUDER-
DALE.

[LORD LOREBURN L.C. Suppose the Court of Session had made a decree that was wrong on the face of it?]

The point should have been taken by the parties. Moreover, in 1685 an attempt was made by the creditors of Lord Dundee, including the appellant's ancestor, to reduce both the charters of 1670 and 1671 and the decree of 1671, and it failed: Reg. of Decrees Durie Office, vol. 113, fol. 132. The decree of 1671 cannot now be reduced because of the negative prescription. To set aside this decree would be to establish a dangerous precedent. Further, the subject-matter of the dispute was not a dignity, but a heritable office which was in commercio, and like a right of fishing could be incorporated in the barony. This was the unanimous view of the Court of Session, and which was well founded in the law of Scotland. Also the respondent's predecessors acquired a prescriptive title (2) to the office of Standard Bearer by virtue of their possession of the barony of Dundee, of which the office became part: *Macdonell v. Duke of Gordon*. (3) For after 1641, when the Scrymgeours had obtained a peerage they put the office of Standard Bearer into their titles, and it was made a component part of the barony of Dundee, which they possessed for more than the prescriptive period. In the same way the office of Earl Marshal had been made a part of the barony of Inverugie in 1592: Reg. Mag. Sigilli, book 38, No. 86. Every office in Scotland, including that of the Earl Marshal, was at one time saleable.

[LORD LOREBURN L.C. There is no decision that all heritable offices were saleable.]

That may be so. But the result necessarily follows from the principles laid down in *Cockburn of Langton's Case* (1) and accepted as

(1) Mor. Dict. 150; 1 Pat. App. 603.

(2) Act 1617, c. 12.

(3) 6 S. 600.

H. L. (SC.)
 1910
 ~~~~~  
 SCRYMGEOUR  
 WEDDER-  
 BURN  
 v.  
 EARL OF  
 LAUDER-  
 DALE.

sound by the House of Lords. The Act of 1600 was good as a title, but it did not render the office inalienable: *Mar Peerage*. (1)  
 [EARL OF HALSBURY. I cannot see how the Acts of 1594 and 1600 have been got rid of.]

It is not necessary to get rid of them. The earlier Act was superseded by the later, and that did not put the office extra commercio. Besides the heirs male failed. Further the Act 1455, c. 44, lent countenance to the view that all heritable rights were in commercio, and the Act of 1670, c. 49, confirming the charter of July 11, 1670, was sufficient warrant to the King to disregard any obstacle alleged to be set up by the Act of 1455. The sole object of such Acts was very often to enable the King to make grants which would have otherwise been ultra vires in consequence of the terms of older statutes. [They stated, at an early stage, that they had abandoned the question of interdict.]

*Wedderburn, K.C.*, in reply. *Bower v. The Earl Mareschal* (2) is not expressly overruled by the case of *Cockburn of Langton* (3) and is not necessarily inconsistent with it. The respondent's allegations as to the High Constable are mistaken in fact. The decree of 1671 was obtained by false facts and bad law, as the limit of degrees of kinship never was the law of Scotland. Moreover, the decree is ex facie bad on many grounds. It is a declaration of the charter, and should be of the gift: *Stair*, iii., 3, 47; *Ersk. Inst.* iii., 10, 3; and it admits the existence of heirs of line, e.g., the Earl's sisters, as well as heirs outside the seven degrees, whereas a total absence of all heirs is essential to such a decree: *Stair*, iv., 13, 1; 1 *M'Laren on Wills*, 80. It is thus a contradiction in terms. It is also ex facie bad quoad the Banner, as the Banner being an honour could not be carried by such a decree. This being so, the negative prescription does not apply. Further, if good at all, it cannot bind the appellant in his present interest. His ancestor was summoned to it as heir of entail and was not then the heir male nor able to use the contention of the heir male. On the other hand, the appellant is brought here as claiming qua heir male. Thus, though he represents Kirkton, Kirkton

(1) (1875) 1 App. Cas. 1, at pp. 19, 3 *ibid.* 420.

21, 22.

(3) *Mor. Dict.* 150; 1 *Pat. App.*

(2) 2 *Brown's Supplement*, p. 18; 603.

did not represent him. The decree has been held in the *Benvie Case* (1) to be bad or at least to be limited to the subjects of the charter of 1617, and of these the Banner was not one. Further, Lord Halton himself repudiated his title under this decree. In the peculiar circumstances of the case the decree can be disregarded without establishing any precedent, but it would be a still more dangerous precedent to hold that a decree of the Court of Session could override an Act of Parliament. The decree does not bear that Dundee died with no heirs male; on the contrary it admits the existence of heirs male outside seven degrees. Moreover, even though the Fardill branch of the Scrymgeours extant in 1671 was senior to Kirkton, it is now extinct, and the appellant has proved the Kirkton branch to be a male branch of the family of Dudhope, and he is admittedly chief of it. He is thus clearly a male heir, if not the heir male, of the Earl of Dundee. The onus of proving the contrary is on the respondent and he has in no way discharged it. Even if the decree were good, the appellant is entitled as a mere defender to call on the respondent and pursuer to prove his title, and this he has failed to do. Even if the appellant were not heir male of the Scrymgeours and had no title, the respondent would not thereby acquire one, as if the Scrymgeours had been extinct the honour of the Banner would have perished with them. The possession of the barony, even if it included the Banner (which is denied), will not give a prescriptive title to the Banner, in the absence of acts of possession of the Banner: *Macdonell v. Duke of Gordon*. (2) The matter in question was an honour, and if necessary it would be contended that the Court of Session had no jurisdiction in it. (3) [He also contended that the appellant had prescriptive possession of the Banner; that if it was not an honour, but an office, Halton had been expelled from it, and that neither Halton in 1672 and 1676, nor the Earls of Lauderdale in 1761 and 1824, had ever in fact effectively adjudicated it. The full argument and decision of these questions were rendered unnecessary.]

H. L. (Sc.)

1910

SCRYMGEOUR  
WEDDER-  
BURN

v.

EARL OF  
LAUDER-  
DALE.

(1) Papers in Advocates' Library;  
Minute Book of Court of Session,  
dated January 18, 1785, and appel-  
lant's printed appendix, 294.

(2) 6 S. 600.

(3) See above, p. 344, and post,  
p. 368.



H. L. (SC.)  
1910  
SCRYMGEOUR  
v.  
WEDDER-  
BURN  
EARL OF  
LAUDER-  
DALE.

LORD LOREBURN L.C. My Lords, I am sure your Lordships are indebted to the learned counsel on both sides for assisting us through the maze of this litigation.

It seems to me that the pursuer was ill-advised in renewing the controversy which had been settled by the Court of Claims, for although the decision of the Court of Claims cannot be treated as *res judicata* so as to bar further litigation, it proceeded from a very high authority which it is not safe to call in question unless there is a very clear case.

My Lords, we have had as the result of this renewed litigation a mass of confused, lengthy, and, in many respects, irrelevant archæological matter, seasoned by a not inconsiderable quantity of bad law.

The pursuer brings an action for the purpose of establishing the proposition that he is the proprietor of the ancient—I might almost call it the venerable—right of the Standard Bearer of Scotland, which seems to have originated as early as the thirteenth century. It is necessary for the pursuer to prove his case. It is of no avail that he should pick holes in the case of the defender, whom he has himself selected to be defender, if there are holes to be picked in the defender's case, of which I am more than doubtful.

His claim is for an ancient office and dignity, and we have first to see what is the nature of that office and dignity. It was contended, on behalf of the pursuer, that it was a thing adjudgable, which might be sold or bought or put up for auction or acquired by anybody—a stranger, a foreigner, or possibly even a limited liability company—as an ordinary pecuniary asset.

I think, my Lords, that it was a right held *jure sanguinis* and not a thing in *commercio* at all. I am aware that there are decisions, at which I will only glance. It has been decided that the office of Usher was adjudgable, but great regret was expressed by the learned judges, who thought they were driven by authority into a decision the principle of which they expressly disapproved. We are not bound to say that the decision in the case of the office of Usher carries with it the necessity of deciding the same thing in regard to the Standard Bearer of Scotland. Indeed I would observe the same attempt was made to treat the

office of Earl Marshal in Scotland as though it also were adjudgable and liable to be put up to auction, and, I suppose, to pass to trustees or anybody who pleases to purchase it. My Lords, good sense prevailed, and it was held that the office of Earl Marshal was not a chattel of that description. I am quite satisfied for myself that we are not bound by any authority to hold that the office of Standard Bearer of Scotland can be treated as a matter of commerce, of buying and selling. And I think that the Scottish law of prescription referred to in the argument does not apply to this case.

I believe your Lordships are satisfied that this is an office which cannot be bought and cannot be sold; that it is an office attached to the blood, and that if the blood fails the grant is spent and the office is extinct. Of course if the grant is spent the King might in the absence of statutory prohibition grant it again to some one else, because the Sovereign is the fountain of dignity. But it so happens that in the year 1455 an Act of Parliament in Scotland was passed prohibiting the Crown from doing so; and this is fatal to the pursuer's alleged title.

This ancient dignity belonged to the family of Scrymgeour, and it had belonged to them since, apparently, the thirteenth century. The limitations under which it was held are dealt with in two Scotch Acts of Parliament, one of the year 1594, under which the present appellant is unquestionably and undisputedly heir of entail unless some nearer title is made good. Some difficulty may be said to arise in regard to that Act of 1594, and therefore I prefer not to found my own decision upon that Act, although I am far from saying that I should reject the contention of the appellant if it rested only upon the Act of 1594. But, my Lords, there is another Act, the Act of 1600, by which this office and dignity goes to the heirs male of the Scrymgeour blood, and I will assume, in favour of the respondent, that was the only limitation which we have to consider. Lord Lauderdale claims a title which had its origin, according to his own statement, in the seventeenth century. I cannot see how it is possible for any title to be obtained in the seventeenth century, having regard to the Act of 1455, unless the pursuer can shew either that he was heir male of the Scrymgeour blood (which is

H. L. (Sc.)

1910

SCRYMGEOUR

WEDDER-

BURN

v.

EARL OF

LAUDER-

DALE.

Lord Loreburn

L.C.

H. L. (Sc.) 1910  
 SCRYMGEOUR  
 WEDDER-  
 BURN  
 v.  
 EARL OF  
 LAUDER-  
 DALE.  
 Lord Loreburn  
 L.C.

not attempted) or that he obtained it by an Act of Parliament which authorized the giving of this hereditary office, notwithstanding the preceding Act of 1455.

My Lords, there are certain Acts of Parliament—three Acts of Parliament—upon which Lord Lauderdale relies. As to the first I will reserve my observations at the moment, but, as to the second and third of them, those Acts are, as well indeed as the first, *salvo jure cujuslibet*, that is to say, they are not to interfere with the right of any one else. Now, that being the case, it becomes incumbent upon Lord Lauderdale to prove, if he can, that the family of Scrymgeour capable of inheriting this dignity is in the male line extinct; and it is obvious that he can avail himself of neither of the latter two Acts unless he can shew that the line was extinct, for otherwise no effect would be given to the *salvo jure cujuslibet*.

Now, has he proved that? What the pursuer's counsel has done has been to subject the pedigree which the defender puts forward to a variety of most ingenious and subtle criticisms; but they have fallen wholly short of proving that the male line was extinct, even if the defender's argument and proof be received with the greatest caution. It seems to me, I must say, that the title of the defender, his ability to be heir male unless some one else with a preferable title is brought forward, is only open to one possible doubt, that is to say the doubt as regards the position in the pedigree of one David of Sonahard.

My Lords, I will not go through the various documents by which the position of David of Sonahard has been called into question, and on which reliance has been placed on both sides, but I think, though the exact place of David of Sonahard has not been established, there is strong ground for saying that his fourth or fifth in descent was an heir male of the Scrymgeour blood, and he being the fourth or fifth predecessor to that person was also an heir male of the Scrymgeour blood. I will not enter in detail upon the deeds or documents, but it seems to me that any old document like these in which a branch line is introduced in family settlements, as we should call them nowadays, or entails, as though they were *hæredes*, is very strong and cogent evidence that they were *hæredes*. And you are not likely to

assume that they were heirs on the mother's side and not heirs on the father's side when the father happened himself to bear the name of Scrymgeour. That seems to me to be hypercriticism and not really to be worthy of attention. Whether, however, the appellant has proved his title or not, it is quite clear to me that Lord Lauderdale has failed in proving the extinction of this line.

Now, my Lords, there is only one other point to which I need allude, on which reliance was placed, and I approach it and treat it with great respect because that was the ground upon which the Court of Session arrived at the conclusion from which I am unfortunately obliged to dissent. The Court of Session relied upon a certain decree in the year 1671 as establishing that the Lauderdale ancestor of that time, and therefore his descendants of to-day, obtained and owned this ancient office and dignity; and it was also relied upon as shewing that there were in fact at that date no heirs male of the Scrymgeours alive.

My Lords, I may be wrong, but I think it is pretty plain from the opinion of the Lord President that although he thought himself bound by this document, the decree of 1671, he did not in the least believe that it represented the truth; and when I remember the historical condition of the country at that time I am not inclined to stretch any decree in favour of one of the then senators of the College of Justice given by the other senators of the College of Justice when the successful litigant was very likely backed by the hand of power—I say I am not disposed to extend any such decision further than I am obliged. That decree deals with lands, and those are proper subject-matters for a decree of the Court of Session; but the decree also deals with and confirms to the Lord Halton of that day this ancient office and dignity upon the ground that it had come back to the Crown as *ultimus hæres* and had then been granted by the Crown to Lord Halton.

Now it is perfectly absurd in law to say that a dignity which is spent by the extinction of the line comes back to the Crown as *ultimus hæres*, and the Court of Session of 1671 had no authority to say so. Still less authority had they, unless they were justified by some statute, to say that the grant made

H. L. (Sc.)

1910

SCRYMGEOUR  
WEDDER-  
BURN

v.

EARL OF  
LAUDER-  
DALE.Lord Loreburn  
L.C.



H. L. (SC.)  
 1910  
 ~~~~~  
 SCRYMGEOUR
 WEDDER-
 BURN
 v.
 EARL OF
 LAUDER-
 DALE.
 ~~~~~  
 Lord Loreburn  
 L.C.  
 ~~~~~

by King Charles II. in favour of Lord Halton of an hereditary office and dignity was a good grant. It was flying straight in the face of the Act of Parliament of 1455 to say anything of the kind; and they had no more authority to say that than they would to-day have authority to say that, for example, a particular peerage had been put up for auction at Charing Cross and a good title acquired by the purchaser. It is entirely outside their jurisdiction and bad on the face of it. I therefore pretermitt any further criticism of that decree of 1671, which appears to me on many grounds open to very grave suspicion. But I content myself with saying, in respect of the office or dignity now in question, that the decree is wholly outside the jurisdiction of the Court of Session of that day or of any day, and to that extent is a nullity.

But, my Lords, it is said—and this is the point which I understand Sir Robert Finlay most naturally and properly desired to be mentioned, and it was dwelt upon by his learned junior with much force and ability—that there had been a preceding Act of Parliament in 1670 which authorized the Court of Session to ratify the grant of this office and dignity to Lord Halton. Now, my Lords, apart from the point of *salvo jure*, that would give a foundation of jurisdiction to the Court of Session if, and only if, we thought that the Act of 1670 was sufficient to overrule the general Act of 1455. My Lords, I am satisfied it is not. It is not sufficient to overrule that Act. The Act of 1670 does not even mention the honour and dignity; and before a decree of that sort, which is directly contrary to an Act of Parliament, is to be allowed validity on the plea that it has been authorized by another Act, that authorization must be clear, explicit, and unmistakable. In my opinion it is not so. Accordingly I am satisfied that the pursuer has no title at all to the office and dignity which he claims under the decree of 1671.

My Lords, under these circumstances, with great respect to the Court of Session, I think this order must be reversed, and I will only say this much further, that it does not appear to me that the Court of Session had before them the point of view which I at least take of this case; and indeed the whole matter has been so mixed up by a variety of references to feudal law,

and with endless disputations in regard to almost every document in the voluminous volume which has been placed before your Lordships, that it is not surprising if in such a multitude of points the cogent and conclusive point should have been somewhat lost sight of—at all events I think it has been lost sight of. In my opinion it is clear that the pursuer has no title, and I think I ought to say that, although the Lord President had only a moral conviction that the appellant is in the male line of this ancient family, I am completely satisfied that he is so, and if it was necessary and relevant to give effect to it I should be prepared to advise your Lordships to do so by a decree.

H. L. (Sc.)

1910

SCRYMGEOUR
WEDDER-
BURN

v.

EARL OF
LAUDER-
DALE.Lord Loreburn
L.C.

EARL OF HALSBURY. My Lords, this case is of great archæological as well as legal interest, but one is so much tempted by the nature of it to go into a great number of matters which are not essential that I shall withhold any observations of my own and content myself with what the Lord Chancellor has said.

LORD ATKINSON. My Lords, I concur with the judgment which has been delivered by my noble and learned friend on the woolsack.

LORD COLLINS. My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, I have considered carefully the proceedings in the litigation of 1671, and with great interest indeed I have read the decree which is the foundation of the judgment of the First Division in the present case. It is a decree obtained in a lawsuit founded upon a charter purporting to have been issued by the Sovereign as *ultimus hæres*.

The whole transactions as narrated in the decree are of a remarkable character. Certain of the Scrymgeour family were there represented, one of their counsel being no less renowned a person than Sir George Mackenzie of notable memory. One of Sir George Mackenzie's clients appears to have been Alexander Scrymgeour. Alexander Scrymgeour's title as an

H. L. (Sc.) 1910
 SCRYMGEOUR
 WEDDER-
 BURN
 v.
 EARL OF
 LAUDER-
 DALE.

heir male holding under previous Acts of Parliament would appear to have been undisputed but for a sophism which crept into the proceedings, to the effect that, as Alexander Scrymgeour appeared only to be an heir male in the ninth degree, any propositions put forward by him or claims urged by him were of no avail and indeed irrelevant.

Lord Shaw of
 Dunfermline.

Shortly after that pronouncement, which impliedly agreed that Alexander Scrymgeour was in fact an heir male, and therefore presumably entitled to succeed in upsetting the proposition upon which alone the King could in any view have succeeded as ultimus hæres, namely, that the Scrymgeour heirs male were extinct, Sir George Mackenzie and his colleagues adopted this procedure: they “passed from their compearance and craved to be marked absent which the said Lords admitted of and decerned in absence.” The whole proceeding is rather curious and prompts certain historical reflections.

In those circumstances, my Lords, I cannot agree that that decree is such as to enable us in this Court to pronounce that it was *res judicata* to all intents and purposes upon the question whether the Scrymgeours were dispossessed of this office in consequence of the heir maleship (to use that term) being extinct. On the face of this decree that was not so. It is, I think, an error into which the Court below has fallen, to treat the present issue between the parties as determined by the result of that suit. For, my Lords, I will go further with regard to it and say, in the first place, that it was not in the power of Sir George Mackenzie to sacrifice the rights of the whole line of heirs male favoured by the Act of 1600, not merely by disappearance from the suit or even by express consent therein, whatever were his powers as counsel with regard to his particular clients or the particular litigants he represented. Secondly, it was not in the power of Sir John Nesbit, who was called as Lord Advocate, by any consent in the litigation to prejudice the rights of the Scrymgeour family as heirs male. Finally, I think that that decree is thus vitally assailed altogether apart from the further question as to whether the office of Standard Bearer to the King in time of war was a piece of heritable estate capable of reversion to the King himself as ultimus hæres. The idea that the King

might recreate the office if the holders thereof were extinct may be reasonable enough, and even then the difficulties under the Act of 1455 to which the Lord Chancellor has referred would emerge; but the idea that the King could become the last heir to the office of being his own standard bearer is a repugnancy which I cannot see my way to clothe with legality. And, differing from a certain portion of the judgment of the Court below, I would add that even though the term "heritable" may be applied to such an office, it by no means follows that it is alienable. I am clearly of opinion that it is not. It follows from this opinion that the attempt to fortify the respondent's title by the law of prescription applicable to, say, landed estate in Scotland entirely fails.

H. L. (Sc.)

1910

SCRYMGEOUR
WEDDER-
BURNv.
EARL OF
LAUDER-
DALE.Lord Shaw of
Dunfermline.

So far, my Lords, as regards the judgment. Then there comes the other point, the plea proponed by the respondents in this case, namely, that they have adjudged this right; and indeed, my Lords, upon examination it is largely because the Lauderdale family appear to propone this right by adjudication that they have a title to contest an issue on this topic at all.

Now, my Lords, I wish to say very plainly that in my view an office of this character is not in itself an adjudgable thing by the law of Scotland. I think, my Lords, the only foundation for that plea is the much-canvassed case in reference to the heritable Usher. In that case a judgment was pronounced from which one of the most enlightened men of his time dissented, namely, Lord President Forbes of Culloden; but all the judges agreed that the practice which they were constrained to confirm was an "irrational practice." In those circumstances, my Lords, I do not think any Court of law should extend a practice which has been thus judicially condemned on account of its irrationality. This office or right is one of those things which in my opinion is not by its nature adjudgable. The idea that it could be swept up in bankruptcy, and, say, that a purchaser should be able to buy at the market cross of Edinburgh the office of being Standard Bearer to the Sovereign in time of war, need not be further remarked upon.

In the circumstances mentioned, my Lords, the title of Lord Lauderdale entirely fails. I add that, for myself, I have the

H. L. (Sc.) greatest doubt as to certain procedure in this litigation. I refer to that which began with an interlocutor of Lord Kyllachy, which has resulted in great expense to both parties, and which gave Lord Lauderdale, though he had no right whatever, unless he could prove that he held a thing which was in its essence adjudgable, a position which entitled him to call upon the Scrymgeours to prove every item of their succession from their ancestor in 1600.

1910

SCRYMGEOUR

WEDDER-
BURN

v.

EARL OF
LAUDER-
DALE.Lord Shaw of
Dunfermline.

My Lords, if Lord Lauderdale's title fails, I think the demand which was made that the Scrymgeours should enter into this elaborate and expensive portion of this litigation was a demand which is not really justifiable; but with regard to what they have done in consequence may I tender my respectful assent to the views of my noble and learned friend on the woolsack. We are not deciding the question, but so far as the facts and pedigrees have been elucidated before this House it appears to me that—to use the language of Scottish procedure—for aught yet seen there is a sufficiency of legal evidence even in the sense that has been so ably argued by Mr. Wedderburn, namely, that his client has proved his descent as heir male under the Act of 1600.

Ordered and adjudged that the interlocutors so far as complained of in the appeal be reversed: And it is further ordered that the respondent do pay to the appellant the costs incurred by him in the action in the Court of Session, and do repay to the appellant the costs paid by him to the respondent: And it is further ordered that the respondent do pay to the appellant the costs incurred by him in respect of the appeal to this House.

Lords' Journals, April 7, 1910.

Agents for appellant: *A. & W. Beveridge, for D. M. Gibb & Sons, S.S.C., Edinburgh.*

Agent for respondent: *John Kennedy, W.S., for Tods, Murray & Jamieson, W.S., Edinburgh.*

[HOUSE OF LORDS.]

BROWN APPELLANT; .. H. L. (E.)
AND 1910
DEAN AND ANOTHER RESPONDENTS. April 14.

County Court—Practice—New Trial—Jurisdiction of Judge to grant a New Trial—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 93.

The power given by s. 93 of the County Courts Act, 1888, to a county court judge, “if he shall think just, to order a new trial to be had upon such terms as he shall think reasonable,” is a judicial not an arbitrary discretion, and the judge is bound by the rules binding upon the High Court.

Decision of the Court of Appeal, [1909] 2 K. B. 573, affirmed.

In an action against the appellant for damages for an assault upon a school girl, who sued by her father as her next friend, evidence was given that the appellant, who was one of the masters in the school, had thumped the girl on her back and pushed her out of the school-room, and that she was ill in consequence. The county court judge (who tried the case without a jury) was not satisfied with the evidence of the blow, but found that the appellant pushed the girl with considerable violence out of the room, and gave judgment for her for 12*l.* and costs. An application for a new trial was made by the appellant upon affidavits suggesting that the illness of the girl was due to her mother having the day after the assault struck her and accused her of telling lies. It was also alleged that the fresh evidence had only been discovered since the trial and could not have been discovered by the exercise of reasonable diligence before the trial. The application was granted by the county court judge. The order for a new trial was set aside by the Divisional Court (Darling and Jelf JJ.) upon the authority of *Murtagh v. Barry* (1) and *Young v. Kershaw*. (2) This decision was affirmed by the Court of Appeal (Lord Alverstone C.J. and Farwell L.J., Fletcher Moulton L.J. dissenting). Hence this appeal.

(1) (1890) 24 Q. B. D. 632. (2) (1899) 81 L. T. 531.

H. L. (E.) *Henry Lynn and R. J. Neville*, for the appellant. The
 1910 County Courts Act, 1888, gives a full and absolute discretion to
 BROWN order a new trial "in every case," but of course the discretion
 v. must be judicial. The judge must think it just that there
 DEAN. should be a new trial. That is the only condition. There is no
 — warrant for adding the words that the rules of the High Court
 apply to county courts. It is necessary that the fresh evidence
 tendered should be material and weighty, but not that it should
 be in all cases conclusive. The dicta in *Murtagh v. Barry* (1)
 and *Young v. Kershaw* (2) go further than there is warrant
 or reason for. In the present case the fresh evidence tendered
 was strongly supported and would, if believed, have resulted in a
 judgment for the appellant. [They also referred to *Lister v.*
Wood (3) ; *Birch v. Birch* (4) ; *Higgins v. King's Proctor*. (5)]

E. E. Wild and H. Claughton Scott, for the respondents, were
 not heard.

LORD LOREBURN L.C. My Lords, the chief effect of the argu-
 ment which your Lordships have heard is to confirm in my
 mind the extreme value of the old doctrine "*Interest reipublicæ
 ut sit finis litium*," remembering as we should that people who
 have means at their command are easily able to exhaust the
 resources of a poor antagonist.

With great respect for the authority of *Fletcher Moulton L.J.*,
 I am of opinion that the order of the Divisional Court confirmed
 by the majority of the Court of Appeal is perfectly right. When
 a litigant has obtained a judgment in a Court of justice, whether
 it be a county court or one of the High Courts, he is by law
 entitled not to be deprived of that judgment without very solid
 grounds; and where (as in this case) the ground is the alleged
 discovery of new evidence, it must at least be such as is pre-
 sumably to be believed, and if believed would be conclusive. I do
 not refer to other considerations which must enter when the
 question is whether a new trial should be granted or not.

There is no such evidence here. The evidence only goes to

(1) 24 Q. B. D. 632.

(3) (1889) 23 Q. B. D. 229.

(2) 81 L. T. 531.

(4) [1902] P. 130, 138.

(5) [1910] P. 151, 157.

damages, the assault being in reality admitted ; and the evidence would not be conclusive even as to damages. The learned judge says : " The case is one of the gravest doubt. But still I am inclined to make an order for a new trial. I am not suggesting the former decision is wrong, but I do think, especially as the man is in a public position and desires a new trial, I think he should have it. The case as I tried it before was one of the very gravest doubt. Now this man thinks or believes he has found witnesses that may lead to a conclusion, and may reasonably lead to a conclusion, in his favour." Those are the grounds upon which the learned county court judge based his decision.

I agree with the judgment of Farwell L.J., in which he says, referring to the earlier authorities, " In the present case the county court judge has disregarded those principles, and has granted a new trial on affidavits which shew at the outside that there will be oath against oath on a new trial—and that is clearly not enough—which shew nothing in the nature of surprise, fraud, or conspiracy, and which also state nothing to shew that the information alleged could not with reasonable diligence have been obtained at the first trial. The real ground that influenced the learned judge appears to have been that he came to his former conclusion of fact with hesitation, and that the matter is serious for the defendant in consequence of his position. Neither of these grounds is in my opinion sufficient."

If therefore your Lordships have jurisdiction, I have no doubt at all that we ought to exercise it in order to secure for this plaintiff the fruits of the lawful judgment which he has obtained from the county court.

But it is said we have no jurisdiction upon the ground that under the County Courts Act a county court judge is entitled to grant a new trial " if he shall think just." Those words do not give him an arbitrary discretion. " If he shall think just" means if he shall think just according to law. The rules to which I have referred are the law which he, like other judges, is bound to obey.

Accordingly in my opinion this appeal ought to be dismissed with costs.

H. L. (E.)

1910

BROWN

v.

DEAN.

Lord Loreburn
L.C.

H. L. (E.) LORD ATKINSON. My Lords, I concur.

1910
BROWN
v.
DEAN.

LORD SHAW OF DUNFERMLINE. My Lords, I concur, but I hope your Lordships will forgive me for expressing doubt upon a single point, and it is not really material to the judgment which has just been pronounced. It is upon the subject of *res noviter veniens ad notitiam*. Speaking for myself, I do not at present see my way to go the whole length of the proposition my noble and learned friend the Lord Chancellor has proposed, to the effect that the *res noviter veniens* must, if believed, be conclusive. It is possible to figure cases in which it might be so gravely material and so clearly relevant as to entitle the Court to say that that material and relevant fact should have been before the jury in giving its decision.

I do not dissent, my Lords, from the judgment as pronounced, but I desire to express my opinion upon that topic. Moreover I do not think that the facts alleged as new were either relevant or material to the main fact of the case, which was whether an assault had been committed in the school by the appellant on one of his pupils. I cannot read the passage from the judgment of the learned county court judge as meaning anything else than that he grants the new trial because, whereas he was then inclined to decide in favour of the plaintiff, but was not very sure, he now inclines to think that he may not decide in favour of the plaintiff, but is not very sure. Anything less satisfactory as an exercise of discretion, or anything more illustrative of the danger of departing from the ordinary rules of administering remedial justice, I can hardly figure.

LORD MERSEY. My Lords, I agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 14, 1910.

Solicitors: *Baker & Nairne, for Cobbett, Wheeler & Cobbett, Manchester; Sharpe, Pritchard & Co., for William Walker, Manchester.*

[HOUSE OF LORDS.]

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| BELLERBY | APPELLANT ; | H. L. (E.) |
| AND | | 1910 |
| HEYWORTH AND ANOTHER | RESPONDENTS. | <u>April 15.</u> |

Dentist—Unregistered Person—Description—“Specially qualified to practise dentistry”—Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 3.

The words “specially qualified to practise dentistry” in s. 3 of the Dentists Act, 1878, refer to a qualification by diploma, certificate, or other hall mark and not to competence or skill.

Decision of the Court of Appeal, [1909] 2 Ch. 23, affirmed.

Barnes v. Brown, [1909] 1 K. B. 38, overruled.

By articles of partnership between the appellant and the two respondents it was provided that if any of the partners should (inter alia) do anything which should be an offence and in contravention of the Dentists Act, 1878, the other partners might determine the partnership. None of the partners were registered under the Act. The respondents put up on the partnership premises a notice containing the names of the partners and the words “Finest artificial teeth. Painless extraction. Advice free. Mr. Heyworth attends here.” The appellant gave the respondents a notice determining the partnership and brought an action against the respondents, claiming a declaration that the partnership was dissolved. Parker J., following *Barnes v. Brown* (1), made the declaration, holding that the respondents had by putting up the notice given the appellant the right to determine the partnership. This decision was reversed by the Court of Appeal (Cozens-Hardy M.R., Buckley and Kennedy L.JJ.). Hence the present appeal. The words of s. 3 of the Dentists Act, 1878, are quoted in the judgment of Lord Loreburn L.C.

W. F. Hamilton, K.C., and *Boome*, for the appellant. Upon the true construction of the Dentists Act, 1878, s. 3, the words “specially qualified to practise dentistry” mean not that the specially qualified person has a degree, or diploma entitling him

(1) [1909] 1 K. B. 38.

H. L. (E.)
1910
BELLERBY
v.
HEYWORTH.

to be registered, but that he has the knowledge, experience, and skill desirable in a practitioner. At all events the words in question, if they do not exclude a qualification by degree or diploma, clearly include personal competence and skill. The words chosen in s. 3 are those which would naturally occur to a draftsman describing a person who has the necessary personal accomplishments. The section must not be construed by the preamble, which is narrower in scope. Sect. 3 stands by itself and no reference to other parts of the Act is called for. Applying this construction to the notice put up in the present case, an offence against s. 3 is committed by the words "painless extraction" and "finest artificial teeth." Those words imply skill and competence, not diplomas or degrees. The decisions do not throw much light upon this question; they all, except *Barnes v. Brown* (1), ignore the considerations above stated. [They referred to *Byrne v. Rogers* (2) and the cases cited in the Court of Appeal.]

Sir Robert Finlay, K.C., Alexander Grant, K.C., and Grimwood Mears, for the respondents, were not heard.

LORD LOREBURN L.C. My Lords, I think the conclusion of the Court of Appeal should be affirmed.

The question of law here is the meaning of the words "specially qualified to practise dentistry," which are found in s. 3 of the Dentists Act, 1878. I look at the preamble of that Act, not for the purpose of controlling the wording of the section, but to explain the purpose of the Act. It looks as if the purpose was to procure registration wherever persons are "specially qualified to practise."

Again, in ss. 4, 5, 6, and 11 of this Act we find references to the qualification, and in those sections the allusion is to qualification by diploma or certificate or some formal hall mark, to use popular words, and not to qualification by competence or skill.

Do the words in s. 3 refer to qualifying or qualified in the same sense? The words are "A person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental

(1) [1909] 1 K. B. 38.

(2) [1910] 2 I. R. 220.

practitioner,' or any name, title, addition, or description implying that he is registered under this Act or that he is a person specially qualified to practise dentistry, unless he is registered under this Act."

H. L. (E.)

1910

BELLERBY

v.

HEYWORTH.

Lord Loreburn

L.C.

The appellant argues that this means that he must not imply himself to be a competent or skilful person; in other words, the appellant argues that self-commendation is prohibited except to registered persons, and that this is the effect of the enactment.

Such a purpose as the prohibition of self-praise seems to me not very germane to the scope of the Act, and not a very likely thing for Parliament to have resolved. The Act itself does not forbid any one from practising dentistry, but it only forbids the assumption of the "name, title, addition, or description." That looks like something very different from self-praise or self-commendation.

On the whole, I think what is referred to is the possession of qualifications for registration, and that the object and effect is to make all who hold what I will in popular language call the hall mark become registered. If they are not registered, then they must not say either that they are registered or that they have the qualifications which would entitle them to be registered. Of course if they do not possess the qualifications which would entitle them to be registered they are still more disabled from making the affirmation prohibited in this section.

I am aware that in expressing this opinion I am differing from the conclusion arrived at in the case of *Barnes v. Brown* (1), but there are authorities conflicting with that decision, particularly the Irish case of *Byrne v. Rogers*. (2) I might well content myself with merely expressing my concurrence with the judgment of the Lord Chief Justice of Ireland, which seems to me to be exhaustive and convincing.

I advise your Lordships to dismiss this appeal.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD ATKINSON. My Lords, I agree, and I wish to express my concurrence in the judgment delivered by the Lord Chief Justice

(1) [1909] 1 K. B. 38.

(2) [1910] 2 I. R. 220.

H. L. (E.) of Ireland, in which the several provisions of the statute are carefully examined. I think the conclusion is sound, and the reasoning by which it was arrived at commands my entire confidence and approval.

1910

BELLERBY

v.

HEYWORTH.

LORD SHAW OF DUNFERMLINE. My Lords, I desire to give express concurrence along with your Lordships to the judgment of the Lord Chief Justice of Ireland in the case of *Byrne v. Rogers*. (1)

My Lords, in all these cases up to *Byrne v. Rogers* (1) there did not seem to me to be a full analysis of the term "specially qualified" in s. 3, as that analysis is illustrated by the subsequent sections of the Act. In them there is particular reference to the word "qualification," and this word is put alongside of words such as "certificate," "diploma," or the like. That qualification appears to be, as the Lord Chief Justice of Ireland says, something in its nature external to the person, and not merely indicative of his own personal accomplishments or skill.

I assent to the course which your Lordship has proposed, and as I say, I desire specially to record my assent to the analysis given by the Lord Chief Justice of Ireland.

LORD MERSEY. My Lords, I had some doubt as to whether I should take part in the hearing of this appeal, inasmuch as it involved the consideration of a judgment to which I was a party; but having heard the argument, and having been convinced that the judgment in which I took part was wrong, I see no reason why I should not say so. I think it was wrong, for the reasons given in the Irish case.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 15, 1910.

Solicitors: *Dixon & Hunt, for E. T. Spencer, Manchester; Percy Robinson & Co.*

(1) [1910] 2 I. R. 220.

[HOUSE OF LORDS.]

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| BUTTERLEY COMPANY, LIMITED . . . | APPELLANTS ; | H. L. (E.) |
| AND | | 1910 |
| NEW HUCKNALL COLLIERY COMPANY, }
LIMITED. } | RESPONDENTS. | April 18. |

*Mines—Overlying and underlying Seams of Coal—Powers of Working—
Subsidence—Right to Support—Evidence—Necessary Implication.*

The owner of land granted to the appellants a lease of a seam of coal overlying another seam, with full powers of working the overlying seam, but reserving to the owner the right of granting a lease of the underlying seam, with full powers of working subject to a covenant by the owner to indemnify the lessees of the overlying seam against physical damage caused by working the underlying seam; the appellants to have the first offer of a lease of the underlying seam. That offer having been made and refused, a lease of the underlying seam was granted to the respondents. It appeared from the leases and from evidence of the practice of mining that the parties must have contemplated that the underlying seam would be worked concurrently with the overlying seam, and that the proper mode of working the underlying seam was by the long-wall system, which would of necessity produce subsidence in the overlying seam:—

Held, that the respondents were entitled to work the underlying seam by the long-wall system, leave to cause subsidence being clearly implied.

Decision of the Court of Appeal, [1909] 1 Ch. 37, affirmed.

The circumstances of this appeal are stated in the judgments of Lord Macnaghten and Lord Atkinson.

1909. May 3, 4, 5, 6; Nov. 29, 30. *C. A. Russell, K.C.*, and *Upjohn, K.C.* (*MacSwiney* with them), for the appellants, contended that the evidence given at the trial did not justify the conclusions of fact drawn by the Court of Appeal, and that the decision of that Court was contrary to a long course of decisions in this House. The cases cited in the Court of Appeal and in the *Butterknowle Case* (1) were discussed.

Sir Robert Finlay, K.C., and *Astbury, K.C.* (*H. T. Waddy* with them), for the respondents.

C. A. Russell, K.C., in reply.

(1) [1906] A. C. 305.

H. L. (E.) The House took time for consideration.

1910

BUTTERLEY
COMPANY,
LIMITED
v.
NEW
HUCKNALL
COLLIERY
COMPANY,
LIMITED.

1910. April 18. EARL OF HALSBURY. My Lords, although my judgment is contrary to that given originally by Neville J., I cannot think that that learned judge and I differ upon the question of law involved in the litigation. I believe he would agree with me but for the construction that he placed upon Lord Macnaghten's words in the *Butterknowle Case*. (1) I will deal presently with those words, and I think that I can see in what way the learned judge has misconstrued them; but in the meantime I think what was said by Lord Blackburn in *River Wear Commissioners v. Adamson* (2) and quoted by Farwell L.J. in this case is very relevant here, since I think a great deal of the difficulty of the construction is solved by considering what are the facts to which the language is applied.

Lord Blackburn said: In construing a document "in all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used and what was the object appearing from those circumstances which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they were used."

Now it is most important here to note that we are dealing with two coalfields, one under the other, and that if the construction adopted by Neville J. prevailed 75 per cent. of valuable minerals would remain unworked; but it is possible to work them both, though it will cause additional expense in doing so, but without destruction to either.

Now the Master of the Rolls points out that in every one of the leases granted to the plaintiffs are to be found provisions which shew that the working of the lower seam during the currency of the lease was contemplated by both parties, and in some of them obligations are imposed upon the plaintiffs to assist or not to obstruct the necessary operations which

(1) [1906] A. C. 305.

(2) (1877) 2 App. Cas. 743, at p. 763.

ex hypothesi it was well known (and I must add here for myself to both parties) must produce subsidence. H. L. (E.)

Now in this case it was proved and not disputed that except in the case of shallow mines (and this was not one) the working of the coal in a seam is inevitably followed by a sinking of the whole of the strata above and consequently of the surface.

The logical result is not, I think, unfairly stated by Fletcher Moulton L.J. when he says: "There is no contest in the present case as to the truth of the above law, or as to its being well known at all times material to the present case. Not only is there the clearest direct evidence of this on the part of the plaintiffs' own witnesses, but their counsel have admitted it and the case has been argued before us on that basis. It follows, therefore, that if the instruments make it clear that it was the intention of the parties that subjacent seams should be worked, it is a necessary implication that they intended that there should be subsidence of the superjacent strata."

My Lords, in the judgment of the Lord Chancellor and in that of Lord Macnaghten, by which, I think, Neville J. was misled, I see they were construing the peculiar language of an Inclosure Act, or, perhaps, to speak more accurately, they were applying the known rule of law to the peculiar conditions of things brought about by the Act which they were construing, and, as the Lord Chancellor said in that same case, the "construction placed upon particular words in one instance does not necessarily prejudice their construction when in a different setting."

All through the Lord Chancellor's judgment it will be noticed how carefully he points out that the nature of the commoner's interest is changed by the Act. And Lord Macnaghten obviously considers that that change has led—perhaps I should say misled—this House, and that the provision for the lord of the manor to enjoy the property as freely as before becomes a dead letter. However that may be, how can it be possible to maintain that what has been said of the right of an owner in respect of surface can be applicable with such an arrangement as is absolutely proved here with respect to the respective rights of each separate owner of the two different seams?

Business men familiar with the subject and knowing what they

1910

BUTTERLEY
COMPANY,
LIMITED
v.
NEW
HUCKNALL
COLLIERY
COMPANY,
LIMITED.

Earl of
Halsbury.

H. L. (E.)

1910

BUTTERLEY
COMPANY,
LIMITED

v.

NEW
HUCKNALL
COLLIERY
COMPANY,
LIMITED.Earl of
Halsbury.

were talking about have used language which necessarily imports that both sets of seams were to be worked ; and as this essentially business document is drawn up for business purposes and for valuable consideration, it is intended that they should be worked.

I think the key to Lord Macnaghten's words, and indeed to the whole judgment of the case, is to be found in the Lord Chancellor's words, where he says that "when the nature of the commoner's interests is changed by an Inclosure Act such as this, his right to support changes also (unless otherwise provided), and the owner of minerals must work them in a way not to damage the extended interest which the commoner has acquired under the Act. If that principle" (he says) "was applicable in the case of *Love v. Bell* (1) I cannot see how it is to be excluded in the present case." The then "present case" was an Inclosure Act of 1757.

I think that the arrangement between the parties here by necessary implication allows subsidence as a consequence of this working the coal as it was intended by both parties to be worked.

I think the judgment appealed from is right and ought to be affirmed.

LORD MACNAGHTEN. My Lords, in this case Neville J. granted an injunction to restrain the respondents, the New Hucknall Colliery Company, Limited, from further working their mines in such manner as to cause an overlying seam of coal known as the Top Hard seam in lease to the appellants or the roads or working places therein or the works connected therewith to crack or subside or otherwise sustain injury.

The Court of Appeal dismissed the action with costs.

I think the Court of Appeal was right and that their judgment is in accordance with the principles laid down in this House and with the decision in the *Butterknowle Case*. (2)

Neville J. seems to have thought that there was something somewhere in the *Butterknowle Case* (2) which prevented him from giving effect to his own opinion in favour of the New Hucknall Colliery Company.

(1) (1884) 9 App. Cas. 286.

(2) [1906] A. C. 305.

Notwithstanding the explanation suggested by my noble and learned friend on the woolsack, I must say, with the utmost respect to Neville J., that I am at a loss to conceive what the learned judge was referring to.

I am quite sure that none of the learned Lords who took part in the judgment in the *Butterknowle Case* (1) intended to depart from the settled principles of law which have been so often recognized here.

Speaking for myself, I have no desire to retract or qualify anything that I am reported to have said in that case. But I must take leave to observe that nothing could have been further from my intention than to unsettle the law laid down in previous cases in this House. Perhaps I should have done better to have given a silent vote in a case which seemed to me to be abundantly clear. But I erred, if I erred at all, out of respect to the very learned and elaborate argument that was addressed to the House and in the hope that I might perhaps contribute something that might relieve counsel in a future case from the necessity or custom of going through all the cases on the subject that have ever been reported in this House and the Courts below.

So far am I from thinking that the decision of Neville J. was in accordance with the judgment in the *Butterknowle Case* (1) that I venture to think that it was contrary to it.

In order to displace the common law right of support there must be either express permission or clear implication. What is clear to one mind may not be clear to another. But it really seems to me that it would be difficult to imagine a case in which permission to withdraw support could be more clearly implied than it is in the present case.

It is I think only necessary to deal with the lease from the Duke of Portland to the appellants. It is plain that the parties contemplated that the underlying seam would be worked concurrently with the Top Hard seam. It was proved, or admitted, that the proper mode of working both seams is by the long-wall system. It was also proved, or admitted, that working by the long-wall system must of necessity produce subsidence in the upper strata. Then provision was made for any physical

H. L. (E.)

1910

BUTTERLEY
COMPANY,
LIMITEDv.
NEW
HUCKNALL
COLLIERY
COMPANY,
LIMITED.Lord
Macnaghten.

(1) [1906] A. C. 305.

H. L. (E.)
 1910
 BUTTERLEY
 COMPANY,
 LIMITED
 v.
 NEW
 HUCKNALL
 COLLIERY
 COMPANY,
 LIMITED.
 Lord
 Macnaghten.

damage. It would be extravagant to suppose that the lessors would have consented to make themselves liable for any further damage when they gave the Butterley Company the option of taking a lease of the lower seams in preference to anybody else.

I am inclined to think an overlying seam has the same natural right of support from below as the surface has ; but certainly the effect of withdrawing support is very different in the two cases. In the one it may be ruin ; in the other it probably means nothing more than increased expense in working.

I may remind your Lordships that this is not the first occasion on which, upon a controversy arising between the several owners of different strata as to their respective rights, an appeal has been made to the science and practice of mining, as understood and followed at the date when the title was severed, for the purpose of ascertaining the true construction of the instrument of severance.

In the case of *Dixon v. White* (1), which came before this House in 1883, the question was whether the appellants as owners of the minerals under lands of the respondents were entitled to work out the whole minerals subject to payment of compensation for damage to the surface or were bound to leave sufficient support. The Lord Ordinary decided in favour of the appellants, who were the defenders in the action. The First Division of the Court of Session recalled the interlocutor of the Lord Ordinary finding that nothing contained in the titles of the parties had the effect in law of taking away or derogating from the right of the pursuers to insist that the defenders in working out the minerals under the pursuers' lands should leave sufficient supports to sustain the surface uninjured. The opinion of Lord President Inglis is given in a note to the report of the case. (2) After dealing with the principal portion of the property, comprising twenty-five acres, his Lordship proceeds as follows : " There only remains for consideration the title which the pursuers have to the six and a half acres, which disposition was granted the year before the disposition of the minerals " (that was in 1799). " Now undoubtedly there is a clause there which is much more difficult to construe than any of those I have

(1) (1883) 8 App. Cas. 833.

(2) 8 App. Cas. 838.

hitherto dealt with The words which cause the difficulty of construction are these :—‘ upon paying any damage that may be occasioned to the said lands by working of the said metals and minerals.’ This may mean any damage that may be occasioned to the surface of the lands by any operations which may be performed by the mineral owner without inquiring or specifying what these operations may be ; or it may mean, as contended for by the defenders, that it contemplates the bringing down of the surface upon condition only of paying damage. Now, keeping in view that long-wall working was a thing then entirely unknown, that the bringing down of the surface in that way was therefore a thing entirely unknown, and that the surface never was injured or brought down at all except by unskilful or negligent working in the ordinary mode by stoop and room, I think it would be very difficult indeed to give that meaning to the words.” And then, after some further observations which I need not quote, his Lordship expressed his opinion that “ nothing but a clear implication or express words ” could deprive the surface owner of his common law right of support, and he added that he was unable to find anything of the kind in the clause in question. The judgment of the Court of Session was affirmed in this House, and although the point on which the Lord President laid stress in the passage I have quoted was not repeated in terms, the reasoning of the Court below with reference to the six acres and a half was approved generally.

Among judges of modern times there is no higher authority than the Lord President Inglis, and I may add that the line of reasoning which he adopted in *White v. Dixon* (1) seems to be in accordance with what was laid down in *Rowbotham v. Wilson* (2) by Lord Wensleydale. The instrument of severance in that case was a private inclosure Act. “ The private Act of Parliament,” says Lord Wensleydale, “ is really no more than an agreement between the parties to it, sanctioned by the Legislature ; and in order to construe that agreement, we may look at the surrounding circumstances at the date of it.” (3)

(1) (1881) 9 R. 375, 387.

(2) (1860) 8 H. L. C. 348.

(3) 8 H. L. C. 348, 363.

H. L. (E.)

1910

BUTTERLEY
COMPANY,
LIMITED

v.

NEW
HUCKNALL
COLLIERY
COMPANY,
LIMITED.Lord
Macnaghten.

H. L. (E.)

1910

BUTTERLEY
COMPANY,
LIMITED
v.
NEW
HUCKNALL
COLLIERY
COMPANY,
LIMITED.

I therefore agree with my noble and learned friend in thinking that this appeal must be dismissed.

LORD ATKINSON. My Lords, this case appears to me to turn to a great degree on the construction of the plaintiffs' lease, or rather upon the construction of a clause in it, reserving to the lessor the right to work or lease the mines underlying the Top Hard seam. If the right so reserved includes the right to cause the subsidence complained of, the plaintiffs must, I think, fail in this suit, though they may under the provisions of the lease be entitled to damages for the injury done to their property.

Neville J. decided in favour of the plaintiffs, feeling himself controlled, as he supposed, by a passage in the judgment of Lord Macnaghten in the *Butterknowle Case*.⁽¹⁾ But for his view of the decision in that case he would have decided in favour of the defendants. His view of the present case is put clearly in the following short passage from his judgment:—"Having regard to the knowledge of the present day that the extraction of the mines underlying the upper strata does as a matter of practical business necessarily lead to their subsidence, I should, were I uncontrolled by authority, feel a difficulty in resisting the argument of the defendants that upon the natural construction of the words used it was intended that the future lessees of the underlying mines should have the right in working their mines to occasion subsidence."

This judgment of Neville J. was reversed by the Court of Appeal.

Some question was apparently raised in the latter Court, though not much pressed before your Lordships, as to whether some of the evidence given at the trial in reference to the system upon which mines are worked in this district, namely, the long-wall system, and the consequences necessarily flowing from that system, was admissible or not. The judgment of Farwell L.J. is unanswerable on that point. The evidence was clearly admissible to shew what the parties to the contract were really contracting about and in what sense they used the language employed in dealing with this matter of business. It was proved

(1) [1906] A. C. 305.

that at the time the lease to the plaintiffs was executed long-wall mining was the system of mining generally adopted in the district in which the mines were situated, and that it was considered to be the most profitable and the best system. It was further proved that it was well known in this district, as elsewhere, that when this system was adopted subsidence of the strata lying above the mine so worked necessarily followed. The subsidence was described as equable or uniform as compared with the irregular subsidence which results from the pillar and stall method of mining, and by reason of this uniformity causes much less damage to the surface and the buildings upon it than the latter. The result of the evidence as to the effect upon the Top Hard seam of the subsidence caused or likely to be caused by working, with proper care and skill, the underlying mine on the long-wall system is that it would not destroy the upper mine, would not make its working impossible or the lease of it in consequence valueless, but that it would inflict injuries on the upper mine which could be adequately compensated for by damages, or that it might make the mine more expensive to work.

It must, I think, be assumed that all these facts as to the methods of working the mine, and their inevitable results, including the nature and extent of the injury caused by subsidence, were known to all the parties to the lease at its date, and that they entered into the respective covenants contained in it with reference to these results.

Accordingly, when the lessees in the first lease covenant, as they do, that they will during the term of the lease "use and work the said seams, veins and mines of coal and substances hereby granted and demised fairly and regularly according to the best and most improved methods now being or hereafter to be in use, and in a workmanlike manner in all respects," it is scarcely possible, in the face of the evidence, to suppose that it was not intended to authorize, if indeed not enjoin, the lessees to work this mine on the long-wall system. No case was, I think, made that any other system of mining was customary or was contemplated. In the case of the lower mine, Neville J. is reported to have asked one of the witnesses of the plaintiffs if it would be possible to work the Deep Soft mine by pillar and

H. L. (E.)

1910

BUTTERLEY
COMPANY,
LIMITEDv.
NEW
HUCKNALL
COLLIERY
COMPANY,
LIMITED.

Lord Atkinson.

H. L. (E.) stall, to which the witness appears to have replied "Yes, it
1910 would be advantageous."

BUTTERLEY
COMPANY,
LIMITED
v.
NEW
HUCKNALL
COLLIERY
COMPANY,
LIMITED.

Lord Atkinson.

The learned judge appears to have then remarked interrogatively, "In which case there would not be subsidence at least for a number of years afterwards?" and the witness, who had already stated that the proper mode of working the Deep Soft mine was the long-wall system, replied, "If they worked a proportion of the coal, assuming they worked 25 per cent. of it, there would be subsidence," which means that 75 per cent. of the coals should be left in situ.

The subject then seems to have been dropped. No further cross-examination was directed to it, nor was substantive evidence given touching the pillar and stall system or its suitability to either mine. It appears to have been treated as altogether an irrelevant matter. Mr. Russell, however, elicited from the witness on re-examination this important statement. He said to the witness, "Questions were put to you as to whether any person with mining knowledge would not have known that the working of a lower seam on the long-wall system must cause subsidence in the upper seam. If there was a question between the worker of an upper seam and the worker of a lower seam, and the surface owner, I suppose any mining person would know that if the surface owner parted with the lower seam and it was worked long-wall, you must let down the surface?" And the witness replied "Certainly."

It must, I think, be therefore taken as established that the Duke of Portland and the appellants intended that the latter should, by the express language of their covenant, be bound, or, if not bound, certainly authorized and entitled, to work the Top Hard seam on the long-wall system, and that if, as a result of carrying out that system in a proper way, the superjacent strata up to and including the surface subsided, the lessor, the owner of those strata and the surface, would have to put up with the injury, and could not restrain the appellants from working the mine in the way so authorized, or recover damages from them for any loss he might thereby sustain. Now, if the lessor thus conferred upon his lessees by this lease the right, as against himself, to cause with impunity the subsidence necessarily

incidental to long-wall mining, the next question is, what was the extent and nature of the right he reserved by the same instruments to himself and his possible tenants in the future in respect of the working of the mines underlying that demised? It would certainly be strange, if the parties intended and contemplated that a system should be followed in the lower mines not only different from that authorized or enjoined in the case of the upper, but from which there would follow, unless more than 75 per cent. of the minerals to be won were left in situ, results certainly injurious in their nature, possibly as injurious as those inevitably connected with the former system, that some provision would not have been made regulating the mode in which the latter mines were to be worked. That, however, is not done. On the contrary, a reservation clause is introduced in general terms, not specifying any particular mode of user, or imposing any limit on output, but contemplating injury of some kind to the mine demised and providing for compensation to be paid to the lessees in respect of it.

By the clause dealing with the underlying mines an option is given to the appellants to take a lease of them. And it is then provided that it shall be lawful for the reversioner or his under-tenants to enter upon any part of the mining area demised and "to sink to, work, get and carry away all or any of the said underlying mines, and for the purposes aforesaid or any of them to sink, make, erect and use all such pits, buildings, engines, machinery, roads, works and conveniences, upon through or *under* all or any of the same lands and over *under* or across all or any of the roads, ways levels and *workings* of the lessees or their executors, administrators or assigns as shall be necessary or expedient so that such roads, ways, levels, and workings be not thereby unnecessarily injured."

It then provides that the lessees shall leave such pillars or ribs of coal and other minerals as the lessor or his agent shall require on account of the shafts, buildings, and works necessary or proper for working the underlying mines, no royalty being charged in respect of the pillars and ribs of mineral so left. There is no provision that pillars should be left in the

H. L. (E.)

1910

BUTTERLEY
COMPANY,
LIMITED
v.
NEW
HUCKNALL
COLLIERY
COMPANY,
LIMITED.

Lord Atkinson.

H. L. (E.)
1910
BUTTERLEY
COMPANY,
LIMITED
v.
NEW
HUCKNALL
COLLIERY
COMPANY,
LIMITED.

Lord Atkinson.

underlying mine to sustain the Top Hard seam, while the reservation of the power to work and carry away *all the* underlying mines is entirely inconsistent with the notion that a system was to be adopted which, if subsidence was to be prevented, would necessitate that over 75 per cent. of the minerals should be left in situ.

It is further provided that in such case the beneficial reversioner shall indemnify the lessees against any physical damage that may be caused by the operations of the tenants of the underlying mines to the mines or mining operations of the lessees. This is followed by an arbitration clause. The word "damage" is, I think, qualified by the adjective "physical" in order to exclude consequential damage, such as the loss of profit or the like. It would appear to me therefore that, having regard to the evidence, this clause must, in order to carry out the intention of the parties, be held impliedly to authorize the adoption by the reversioner or his future tenants of the long-wall system of mining with its inevitable consequences in the Deep Soft mine. Nor do I think there is anything in the judgment of Lord Macnaghten in the *Butterknowle Case* (1) which forbids such a construction. One of the things which differentiates that case from the present is, to use the language of Farwell L.J., "the impossibility to the knowledge of both parties of getting the lower seam without letting down the upper seam, and the possibility of letting down the upper seam without totally destroying it." The construction of the lease of the lower strata, which would mean derogating from the grantor's grant to such an extent as to make the thing granted comparatively valueless, would be that which required that 75 per cent. of that seam should be left unworked. Past experience has shewn that the mine can be worked on the long-wall system without any loss comparable to this.

The instrument of severance in this case (the first lease) has, it would appear to me, authorized by necessary implication the interference and disturbance with the upper mine which is complained of, in that it has authorized the system of mining of which that disturbance is the inevitable consequence, and thus

(1) [1906] A. C. 305.

comes within the exception mentioned by Lord Macnaghten. There is, therefore, no room for a presumption such as that which is taken to apply to cases between the owner of the surface and the owner of a subjacent mine, namely, that the parties to the document of severance could not have intended that the surface should be destroyed, when effect can be given to the rights of both parties by restricting the mine owner to working his mine "so far as is possible without letting down the surface."

H. L. (E.)
1910
BUTTERLEY
COMPANY,
LIMITED
v.
NEW
HUCKNALL
COLLIERY
COMPANY,
LIMITED.

My Lords, I therefore am of opinion that the judgment of the Court of Appeal was right and should be affirmed, and the appeal dismissed with costs.

Lord Atkinson,

LORD COLLINS. My Lords, I agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 18, 1910.

Solicitors : *Thicknesse & Hull; J. P. Garrett, for Watson, Esam & Barber, Sheffield.*

[HOUSE OF LORDS.]

H. L. (E.) LORD LLANGATTOCK APPELLANT ;
 1910
 AND
 April 19. WATNEY, COMBE, REID & CO., LIMITED. RESPONDENTS.

Licensing Acts—Compensation—Charge on Renewed Licences—Deduction from Rent — Unexpired Term — Reversionary Lease — Licensing Act, 1904 (4 Edw. 7, c. 23), s. 3, sub-s. 3 ; Sched. II.

The expression “unexpired term” in Sched. II. of the Licensing Act, 1904, must be construed strictly and legal effect given to legal language. It does not include an interest in a reversionary lease which is a mere *interesse termini*.

The respondents were lessees of a public-house under a lease expiring at Christmas, 1909, and were also grantees of a lease of the same public-house for a term beginning from the day next but one after the expiration or other sooner determination of the expiring lease. The licence was renewed in October, 1908, and quarter sessions imposed a compensation charge under s. 3, sub-s. 1 :—

Held, that the unexpired term did not include the lessees’ interest in the reversionary lease, which was a mere *interesse termini*.

Decision of the Court of Appeal, [1910] 1 K. B. 236, affirmed.

THIS appeal turned entirely upon the meaning of the expression “unexpired term” in the Second Schedule of the Licensing Act, 1904. It is unnecessary to set out again the details of the special case which raised this question. They are fully related in the report of the decision of the Court of Appeal. The arguments of counsel before the Court of Appeal dealt with all the points for and against the contending parties, and these are discussed in the judgment of this House. Nothing new arose in this House.

Macmorran, K.C., and *Ryde*, for the appellant.

Acland, K.C., and *Bruce Williamson (Bodkin with them)*, for the respondents.

LORD LOREBURN L.C. My Lords, at the first blush, the effect of the Licensing Act, 1904, according to the decision of the Court of Appeal, seems hard upon the appellant, and I do not

doubt that in a sense it is hard; but if we consider the meaning of the Act it will appear that the provisions may, in particular cases, operate with apparent unfairness to more persons than those in the position of the appellant.

What we have to decide is the meaning of the words in the Second Schedule. The words are that a person shall be permitted to deduct from his rent according to a particular scale in respect of his "unexpired term." We have been asked to take what may be called a popular view of the word "term," and upon this ground: that the Act provides that upon the withdrawing of a licence otherwise than for specified grounds compensation is to be paid to all who are interested in the licensed premises which are to be deprived of the licence; and it seems upon the face of it equitable (we are told) that all who are interested in the premises should contribute to the fund from which the compensation is to come.

At first sight it would seem singular that those who are to receive compensation are not to contribute towards the fund, which provides the compensation, in proportion to their real interest.

When the Act is examined, it appears that the compensation levy is annual, and the annual levy is adjusted to a scale provided in the Second Schedule. It is imaginable that a levy might be prescribed by Parliament to be assessed in one of two ways. The Act might say that you should ascertain what in each year was the entire interest of the different persons interested in the premises and assess them accordingly. There would be considerable difficulty, no doubt, in working out a scheme of that kind, and there is no provision or machinery whatever in the Act for that purpose. You would have to determine the values of the several persons' interests, and not the rent which they are paying, as the basis upon which they were to contribute.

Another method which might be prescribed, and which I think has been prescribed by Parliament, is that you are to take the actual term possessed by the tenant in the legal sense of the word and the rent actually payable under that term, and, by enabling each person who pays rent to deduct from the rent

H, L (E.)

1910

LLAN-
GATTOCK
(LORD)

v.

WATNEY,
COMBE,
REID & Co.,
LIMITED.

Lord Loreburn

L.C.

H. L. (E.) according to a fixed scale, distribute the annual burden not among all who may have an interest in the property, but among all who pay rent for it or who receive rent in respect of it.

1910
 LLAN-
 GATTOCK
 (LORD)
 v.
 WATNEY,
 COMBE,
 REID & Co.,
 LIMITED.
 Lord Loreburn
 L.C.

Which of those two is the true construction of the present Act? I think the latter is for several reasons. One is that while the 2nd section of this Act, which prescribes the distribution of the compensation, speaks of the interest of the persons entitled, the Second Schedule, which imposes the contribution, does not speak of interests, but adjusts the contribution to the rent and to the rent of an unexpired term. In construing an Act of Parliament we must give weight to a difference so obvious upon the face of it.

Another reason is that if you say that "unexpired term" does not mean unexpired term in the legal sense, but means unexpired period, of what is it to be the period? Is it to be the period of all the years for which a tenant may have a right to enjoy the property either at present or in future? Mr. Macmorran and Mr. Ryde shrink from this conclusion. They would have us disregard an *interesse termini* which is to come into enjoyment in the future if a sufficient interval stands between it and the subsisting term. What is a sufficient interval? There is nothing in the Act to suggest the answer; and it would leave this enactment in hopeless confusion if we were to say that the sufficiency or insufficiency of the interval had to be discussed and decided in each particular case. Why are we to say that an *interesse termini* is to be disregarded if it is a sufficient interval? If you adopt the view that the word "term" in the Second Schedule is the same thing as "period," then it seems to me you are logically bound to count up all the periods which the tenant has, either in the present or in the future, however distant the future periods may be; and I do not see how that method is to be worked if the periods of all the present and future interests are to be counted together. A man might have a term in possession ending next year, and he might have a right, either a freehold right or an *interesse termini*, which would arise many years hence; and it would be inequitable or unfair (if we are to scrutinize the fairness of an Act of Parliament) to count those two together and so to regulate the levy that the tenant would have to pay in *præsentia*

in respect of an interest long deferred, exactly the same as if that interest was at present enjoyed.

My Lords, if we are to regard what is called equitable and fair in construing this statute, it seems to me that there may be imagined, equally on either side, cases which would seem harsh or inequitable. Our only course is to follow the words of the statute. I do not repel the possibility of treating language employed in an Act of Parliament as having the ordinary or common signification distinguishing it from the legal or technical interpretation; but I do not think there is any ground for departing in this case from the strict words of the Act itself. We must construe the Act as it stands and give legal effect to legal language.

My Lords, it seems to me pretty clear that this schedule is imperfect in the sense that it does not contemplate or provide for a variety of contingencies. For example, I do not know how you would work, under this schedule, the case where there was a lease for lives; and, though I do not wish to decide upon any matters which are not before the House at the present moment, I think I can see that, if there was an *interesse termini* to begin a day after the conclusion of a subsisting lease and the *interesse termini* belonged to a complete stranger, an anomaly would arise. A person possessed of an *interesse termini* who pays no rent and receives no rent would not be liable to contribute at all to the levy, and yet he would be entitled to a very large share of the compensation; and so also in the case of the last years of a long lease on a peppercorn rent.

These are only illustrations of the various anomalies which may possibly arise in the working of the scheme prescribed by this Act. Whether the appellant or the respondents are right, anomalies would exist on one side or the other. We have, therefore, no choice except to look at the language of the Act and construe it and apply it accordingly, and I think that in this instance the Court of Appeal has properly applied it.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD ATKINSON. My Lords, I concur. The learned counsel for the appellant ask us to give to the word "term" a meaning

H. L. (E.)

1910

LEAN-
GATTOCK
(LORD)

v.

WATNEY,
COMBE,
REID & CO.,
LIMITED.

Lord Loreburn
L.C.

H. L. (E.) 1910
 LLAN-
 GATTOCK
 (LORD)
 v.
 WATNEY,
 COMBE,
 REID & CO.,
 LIMITED.
 Lord Atkinson.

which I do not think, so far as my knowledge goes, has ever been attributed to it by any Court of justice, namely, as including not only the time during which a lease in possession will run, but the time for which leases in reversion may be given; and they ask us to do that because they say that all persons interested in the premises share in the contribution; that those who enjoy the benefit should bear the burden, and that that principle is so imperative that we must strain the language of the statute in order to carry it into effect.

The answer to that contention to my mind is that you violate the principle in other directions as much as you apply it in the interests of the client for whom they appear. There are injustices that will be done whichever argument you adopt, and under those circumstances there is nothing to induce the House to depart from the ordinary sense of the language used, which provides that the entire burden is to be thrown upon the licensee, and that he can only shift it off his own shoulders in so far as the relation of landlord and tenant exists in those above him by a deduction from the rent which he pays, a rent which must be paid not under the reversionary lease at all, but under the lease existing at the time.

I therefore entirely concur with the judgment which has been delivered by my noble and learned friend on the woolsack. I think that the decision of the Court of Appeal is right.

LORD SHAW OF DUNFERMLINE. My Lords, I confess I have had considerable difficulty in this case. As the result of the argument it appears to be clear to myself, and I think to all your Lordships, that this statute in its provisions does not make the burden of the annual charge coincident with or even proportional to the receipt of the compensation ultimately to be awarded. At all events I am clear that the statute in its expression is not a plain enough general indication to that effect to enable us to adopt a particular construction of the word "term" which is here employed. That word occurs in the Second Schedule of the Act, and the words are these: "A person whose unexpired term does not exceed," and so on. My Lords, that language is, of course, inaccurate and inappropriate. There is no term of a person in

the ordinary sense of the word at all; and therefore each party is driven to amplify the word "term." The expression means "a person the unexpired term of whose interest," says the one, or "a person the unexpired term of whose lease," says the other.

My Lords, in analysing this statute, in order to ascertain which of those is to be taken as the correct interpretation, my judgment is that the schedule applies, and applies only, to the relation of landlord and tenant, and to the term of these relations qualifying the deduction which is to be made from the rent. I think there is much force in the contention which was presented by the appellant, that it would have been reasonable to say that the person referred to is a person the term of whose interest does not expire. But, my Lords, when I find that the schedule deals and, as my noble and learned friend Lord Atkinson has observed, deals only with those who stand in the relation of landlord and tenant, I am bound, although with some reluctance, to concur with your Lordships in this view: that it is to the lease, and the existing lease alone, that the word "term" applies.

My Lords, I cannot say that, even if the judgment had been upon the other side, there would not have been also a sense of reluctance in delivering it; because I am convinced that, whichever interpretation of this statute as drawn is taken, hardship and unreasonable results will follow. But that, my Lords, is a consequence for which your Lordships, as the interpreting body, are in no way responsible.

LORD MERSEY. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 19, 1910.

Solicitors: *Johnsons, Long & Co.; A. H. Macpherson.*

H. L. (E.)

1910

LLAN-
GATTOCK
(LORD)

v.

WATNEY,
COMBE,
REID & Co.,
LIMITED.

Lord Shaw of
Dunfermline.

[HOUSE OF LORDS.]

H. L. (E.) GRANT APPELLANT ;
 1910 AND
April 21. OWNERS OF S.S. EGYPTIAN RESPONDENTS.
 THE EGYPTIAN.

Admiralty—Collision—Negligence of Defendants' Servant causing original Damage—Negligence of Plaintiffs' Servant causing subsequent Loss—Servant acting in Dual Capacity—Liability for Consequential Damage.

A watchman employed by the appellants to take charge of their trawler in dock agreed with the respondents' manager to take the respondents' trawler into the same dock. By pure negligence the watchman so navigated the respondents' trawler as to cause a collision with the appellants' trawler. Instead of examining the damage done to the appellants' trawler, as in duty bound, he entirely neglected his duty and consequently the appellants' trawler sank in the dock :—

Held, that though the respondents were liable for the damage caused by the collision they were not liable for the foundering of the appellants' vessel, it having been proved that the vessel need not have sunk if the watchman had examined the appellants' trawler immediately.

Decision of the Court of Appeal, [1910] P. 38, affirmed.

THE material circumstances of this appeal are stated in the head-note.

Laing, K.C. (*Balloch* with him), for the appellants.

Batten, K.C. (*A. D. Bateson* with him), for the respondents.

LORD LOREBURN L.C. My Lords, it is admitted that the *Egyptian* was to blame for causing damage to the *Nelson* ; but the question is whether the *Egyptian* can shew that the damage naturally flowing from the injury has been increased beyond what it would otherwise have been by reason of the negligence of the owners of the *Nelson* or their servants.

I should always scrutinize closely any contention by which a wrong-doer seeks to throw upon an innocent party any portion of the consequences which flow from the wrong. An admitted fault of the *Egyptian* does not place her in a favourable position. But two Courts—in particular the Court of first instance, which

saw the witnesses—have found, with the concurrence of the Elder Brethren, that there was negligence by a servant of the owners of the *Nelson*, one Barron, whose neglect inflamed the damage and led to the sinking of the ship.

It is a circumstance of importance that both Courts have found in the same way upon a question of fact; and that would naturally have great weight with your Lordships according to our familiar practice.

I concur with the learned judges in both the Courts below, that Barron the watchman, knowing of the collision, did not take proper and reasonable steps for examining the part of the ship where the impact took place. I agree with the Court of Appeal, that he was required to examine the *Nelson* within the scope of, and by reason of, his duty to his employers, the owners of the *Nelson*. I cannot see how it can be said that Barron the less neglected his duty to the owners of the *Nelson* by reason of the fact that he had been guilty of a prior act of neglect towards them, in taking control of the *Egyptian* and bringing her into dock.

Accordingly I think that this appeal must be dismissed. But after the argument on the merits had been heard, I put it to Mr. Batten that but for the fact that the *Egyptian* had employed Barron (while acting in service to others) to bring their vessel into the dock the accident presumably would not have taken place. I put that view to Mr. Batten with regard to the question of costs, and he has indicated on behalf of his clients that he would desire that the House should deal with that point.

There is not anything in the nature of moral obliquity on the part of the owners of the *Egyptian*, but it is rather hard that they employed a servant of the *Nelson*, in effect, to ram the *Nelson*, and then seek to escape the consequences by saying that that same person failed also, in the subsequent hours, in his duty to the owners of the *Nelson* itself.

Under all the circumstances I think there ought not to be any costs of this appeal upon either side.

LORD JAMES OF HEREFORD. My Lords, I concur.

H. L. (E.)

1910

GRANT

v.

OWNERS

OF S.S.

EGYPTIAN.

Lord Loreburn
L.C.

H. L. (E.)
 1910
 GRANT
 v.
 OWNERS
 OF S.S.
 EGYPTIAN.

LORD ATKINSON. My Lords, some confusion has, I think, arisen in the case by reason of the double position which Barron occupied. In my view the case must be decided in point of law as if Barron had never been on board the *Egyptian*, with this qualification: that his position there fixed him with full knowledge of the fact that the collision had occurred, and of its nature.

The defendants have pleaded that the plaintiffs could, by the exercise of ordinary care, have avoided the consequence of the defendants' negligence. The question, as it appears to me, is, have they proved that plea? In my opinion they have. Barron, as watchman of the plaintiffs' ship, with the full knowledge that he had of the collision, was bound, I think, to exercise ordinary care to ascertain the nature of the injury done. He failed to exercise such ordinary care. Had he exercised it, he must, I think, on the evidence, have ascertained what this injury was, and had he ascertained it, it is almost admitted that the mischief could have been remedied or prevented by plugging the hole.

I fully concur in what my noble and learned friend on the woolsack said as regards the costs, because it is undoubted that the defendants in this action have inflicted serious injury upon the plaintiffs, and yet they escape from the consequences of that injury by reason of the negligence of the plaintiffs' servant, whom they had—I think it is not using an extreme expression to say—decoyed away from his proper business and used for their own purposes. I am very glad that the costs of this appeal should not be given to those who have been successful under such conditions.

LORD SHAW OF DUNFERMLINE. My Lords, in this case a slight injury was done to the steamship *Nelson* by driving a rivet eye-hole in her starboard quarter out of its position and into the body of the ship. That was a slight injury, the responsibility for which is acknowledged by the defendants; and that has been the subject of no litigation. Following it, however, another and more serious occurrence took place, namely, the sinking of the vessel.

My Lords, in these cases two principles, too often put separately, but really conjoined, may be stated, namely, that the defendants are liable for the damage which is the natural and direct

consequence of their wrongful act: that would cover the slight injury to which I have alluded. The second principle is that the defendants are not liable for any further damage which could have been avoided or minimized by the exercise of reasonable care on the part of the plaintiffs. This is really not a separable proposition from the other in the sense of being independent of it; it is only a development or corollary of the former proposition; because the latter further damage is caused not as the natural and direct consequence of the defendants' act, but by reason of the neglect of that care which was reasonable in the circumstances on the part of the owners of the *Nelson*. That neglect is found to be established in fact. It led—and causally considered it alone led—to the sinking of the ship, and accordingly the responsibility therefor cannot be placed upon the defendants.

These two things have been properly distinguished by the owners of the *Egyptian* throughout. Their offer for compensation, limited to the slight injury which was the result of their negligence, has been justified by the result of this litigation; but the further damage now claimed has not been found due. In my opinion this result is correct, as the further damage fell on the plaintiffs' ship by reason of the plaintiffs' own neglect already alluded to.

On the matter of costs, I agree that the attitude taken very properly by the respondents' counsel at your Lordships' Bar has enabled us to do what, underneath all these transactions, may be considered to be a substantial act of justice.

LORD MERSEY. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed: each party to bear their own costs of this appeal.

Lords' Journals, April 21, 1910.

Solicitors: *Woodhouse & Davidson; Deacon & Co.*

H. L. (E.)

1910

GRANT

v.

OWNERS
OF S.S.
EGYPTIAN.

Lord Shaw of
Dunfermline.

[HOUSE OF LORDS.]

H. L. (E.) CATT (PAUPER) APPELLANT ;

1910

AND

April 28. WOOD AND OTHERS RESPONDENTS.

*Friendly Society—Dispute—Arbitration under Rules—Order to pay Costs—
Jurisdiction—Ultra vires—Friendly Societies Act, 1896 (59 & 60 Vict.
c. 25), s. 68.*

The appellant, a member of a friendly society, claimed from the society sick pay on behalf of his son, who was also a member, but was mentally afflicted and unable to claim it for himself. The court arbitration committee decided against the claim, and that decision was affirmed on appeal by the district arbitration committee, who charged the appellant with the expenses of the proceeding. The appellant having refused to pay the expenses was suspended and ceased to be a member. In an action by the appellant against the society claiming an injunction and damages for wrongful exclusion :—

Held, that the questions about sick pay and expenses were disputes within s. 68 of the Friendly Societies Act, 1896, and therefore should be decided only in the manner directed by the rules of the society ; that the rules were not ultra vires ; that the decisions—even if erroneous in point of law—being given without misconduct were binding and conclusive and not removable into any Court of law or restrainable by injunction and could be enforced without resorting to a county court ; and that the action was not maintainable.

Decision of the Court of Appeal, [1908] 2 K. B. 458, affirmed.

THE appellant brought this action against the respondents as trustees of the Ancient Order of Foresters Friendly Society, which was registered under the Friendly Societies Act, 1896. Lord Coleridge J. gave judgment for the respondents and that judgment was affirmed by the Court of Appeal (Vaughan Williams, Farwell, and Kennedy L.JJ.). Hence this appeal.

Among the rules of the society was general law 68, section 4, which empowered the district arbitration committee to confirm, rescind, or alter any decision appealed against “and charge either party with the expenses of the committee or of witnesses in a case.”

By general law 70, section 1 (A), “The decision of every arbitration and appeal committee shall be binding immediately after it has been given by the committee unless otherwise

ordered; and any member, court or district refusing to comply shall be suspended from the Order.”

By s. 68, sub-s. 1, of the Friendly Societies Act, 1896, “Every dispute between (a) a member or person claiming through a member or under the rules of a registered society or branch and the society or branch or an officer thereof . . . shall be decided in manner directed by the rules of the society or branch, and the decision so given shall be binding and conclusive on all parties without appeal and shall not be removable into any Court of law or restrainable by injunction; and application for the enforcement thereof may be made to the county court.”

H. L. (E.)

1910

CATT

v.

WOOD.

A. E. Hughes (*J. Simmons* with him), for the appellant, contended (inter alia) that the appellant appeared in the arbitration proceedings on behalf of his son and not on his own behalf; that for that purpose he was not a member or liable to be dealt with as a member within general law 70, section 1 (A); that he was not a party to the proceedings or liable to pay the expenses; that the rules under which the society acted were ultra vires; that the action he brought against the society after he had ceased to be a member was maintainable and was not precluded by the Friendly Societies Act, 1896; that the society had no power to enforce the payment of costs by suspension; and that their only remedy was by an application to the county court as provided by the Friendly Societies Act, 1896, s. 68. [They referred to *Andrews v. Mitchell* (1), *Palliser v. Dale* (2), and the cases cited in the Court of Appeal.]

Montague Lush, K.C., and *John Leslie*, for the respondents, pointed out (inter alia) that the appellant could not deny that even if he was not claiming the sick pay as a member he was “a person claiming under the rules of a registered society” and therefore within s. 68 of the Friendly Societies Act, 1896, which ousted the jurisdiction of the Courts of law, whether he was a member or not. [They referred to the Friendly Societies Act, 1908 (8 Edw. 7, c. 32).]

A. E. Hughes in reply.

(1) [1905] A. C. 78.

(2) [1897] 1 Q. B. 257.

A. C. 1910.

3

2 E

H. L. (E.)

1910

CATT

v.

WOOD.

LORD LOREBURN L.C. My Lords, I am glad to learn from the learned counsel who appeared for the appellant that he does not complain of any hardship in this case if he be wrong in the legal contentions which he has advanced before this House.

I do not share the doubts which seem to have been expressed in the Courts below as to the decision which your Lordships should arrive at. There is no case of misconduct alleged against those who administer this society (I speak of misconduct in its technical sense) such as was acted upon in the case of *Andrews v. Mitchell*. (1) This is a case in which the appellant, who was a member of the friendly society, made a claim under general law 42, sub-section 2, against the society on behalf of his son, who was mentally afflicted and could not make the claim for himself. Under that general law the appellant claimed as a relative recognized by the society on behalf of his son to be paid the moneys due to the son as a member of the society. The society, having decided against the appellant on a certain point which need not be specified, treated him as a person who was a party to the proceedings under general law 68, section 4, and charged him with the expenses as a party.

Now, my Lords, that was decided in this domestic forum against the appellant, who was then a member of the society himself. He refused to obey the direction of that domestic tribunal, and being a member he was then suspended under general law 70, section 1 (a). I cannot agree that there was any duty under the Friendly Societies Act, 1896, to enforce the decision of the society by going to a county court. I think that the society were entitled to use against a member such remedies as the general laws gave to them. They exercised that right; they suspended this appellant, and his suspension was followed in due course by expulsion for not complying with the order that had been made.

It is not necessary to pronounce in regard to various points that have been raised, or to come to the conclusion that in point of law we should have said the same thing as the society said. I do not suggest that the decisions of the society which have been complained of were invalid in law or contrary to

(1) [1905] A. C. 78.

fairness. Even if they were erroneous in point of law, it seems to me that your Lordships and the Courts below have no authority to interfere. Sect. 68 of the Friendly Societies Act, 1896, enacts that "Every dispute between" "a member or person claiming through a member or under the rules of a registered society or branch and the society or branch or an officer thereof" "shall be decided in manner directed by the rules of the society or branch, and the decision so given shall be binding and conclusive on all parties without appeal, and shall not be removable into any Court of law or restrainable by injunction."

Now, my Lords, there can be no doubt that upon both of the occasions on which decisions were made by the society in this case there was a dispute between the appellant and the society; the appellant was a member; the appellant was also a "person claiming" "under the rules of a registered society or branch" against the society. It seems to me we have the most express enactment forbidding Courts of law from interfering in a matter of that kind. I think it is most necessary that we should obey loyally the enactments which were made in order to prevent multitudinous litigation and to give effect to decisions (if they be honest and not open to a charge of misconduct) of those who are deciding rightly or wrongly within the jurisdiction which is confided to them by the laws of this country.

A question was raised in regard to the decision of the Court of Appeal in the case of *Palliser v. Dale* (1), and it was suggested that, as this appellant had ceased to be a member by virtue of the expulsion before this litigation began, he was exempt from the restrictions imposed upon him by the section of the Act which I have just read. I cannot assent to that view, because I think these disputes which are the substance of the litigation were disputes which fall within the jurisdiction of the domestic forum and have there been adjusted.

Another point was made by the learned counsel for the appellant to the effect that these rules are ultra vires—that is to say that they are not such as can derive authority from the Act of Parliament. I do not think that that is so. In my opinion

H. L. (E.)

1910

CATT

v.

WOOD.

Lord Loreburn
L. C.

(1) [1897] 1 Q. B. 257.

H. L. (E.) they are part of the necessary, or at all events the permissible,
1910 machinery to preserve harmony in the working of these
CATT societies.

v.
WOOD.

LORD ATKINSON. My Lords, I agree.

LORD MERSEY. My Lords, I agree.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, April 28, 1910.

Solicitors: *Russell & Arnholz; W. J. & E. H. Tremellen, for Ward & Shephard, Dudley.*

[HOUSE OF LORDS.]

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|-------------------|-----------|--------------|----------------|
| THOMPSON (PAUPER) | | APPELLANT; | H. L. (E.) |
| | AND | | 1910 |
| GOOLD & CO. | | RESPONDENTS. | <u>June 9.</u> |

Master and Servant—Employer and Workman—Compensation for Injuries by Accident—Claim for Compensation—No Demand for specific Sum—Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 2.

In making a claim for compensation under the Workmen's Compensation Act, 1897, it is not necessary to specify any sum.

Former authorities and dicta to the contrary effect overruled: *per* Lord Atkinson and Lord Shaw of Dunfermline, they proceeded on a misunderstanding of dicta in *Powell v. Main Colliery Co.*, [1900] A. C. 366.

Decision of the Court of Appeal (not reported) reversed.

APPEAL from a decision of the Court of Appeal.

The circumstances of the appeal are fully stated in the judgment of Lord Mersey.

April 11, 13. *Cavanagh and E. E. Humphrys*, for the appellant. The Act does not require that the sum claimed should be specified. Notice of accident and claim for compensation are separate stages in the proceedings. A notice must give full particulars in writing. A valid claim may be made by word of mouth: *Lowe v. Myers*. (1) The cases on which the decision of the Court of Appeal was based were founded on a misapprehension of *Powell v. Main Colliery Co.* (2) In that case the sum claimed was specified and the point here involved was not in issue. But unwarrantable inferences have been drawn from the language used by noble and learned Lords. There is not a word in the Act about specifying the amount of the claim. It might not be possible to do so until the extent of the injury was ascertained. The Act provides a scale and the employer generally knows as much as the workman injured. The decisions in Scotland and Ireland which the Court of Appeal followed were wrongly decided: *Bennett v. Wordie* (3); *Park v. Maver* (4); *Kilpatrick*

(1) [1906] 2 K. B. 265.

(2) [1900] A. C. 366.

(3) (1899) 1 F. 855.

(4) (1905) 43 Sc. L. R. 191.

H. L. (E.) v. *Wemyss Coal Co.* (1); *Marno v. Workman, Clark & Co.* (2)
 1910 The Court of Appeal did not follow its own decision in *Linklater*
 THOMPSON v. *Webster.* (3)
 v.
 GOOLD & CO.

The Court of Appeal exceeded its jurisdiction in ordering a stay of execution. It is for the county court judge alone in a proper case to make such an order. If a sum ought to have been mentioned, that requirement was waived.

Sanderson, K.C., and *Shakespeare*, for the respondents. There has been no waiver. Notice and claim are no doubt distinct. That is in the respondents' favour. Otherwise a mere demand would be enough. *Powell v. Main Colliery Co.* (4) is in the respondents' favour, though this precise question was not involved. The Lord Chancellor expressly approved *Bennett v. Wordie* (5) and *Marno v. Workman, Clark & Co.* (2); and Lord Davey was content to adopt *Romer L.J.*'s judgment, in which the requirement of a fixed sum was stated. The decisions cited from Ireland and Scotland are consistent and sound.

No reply was called for.

The House took time for consideration.

June 9. LORD LOREBURN L.C. My Lords, there is no doubt that the decision of the Court of Appeal in this case has support from earlier authorities, though I do not think that any deliberate opinion has been expressed in this House, or even that the precise question has been raised. Your Lordships would, however, at all times, pay the utmost respect to these authorities; but I confess that they do not convince me, and they seem to proceed rather upon considerations of public policy than upon a strict interpretation of the Act of Parliament.

This Act says that "the claim for compensation" must be made within six months of the accident. It has been held in the Court of Appeal that unless the amount claimed has been specified there has been no "claim for compensation." I cannot see why it should be so. There is no such provision in the Act itself; I mean in its actual terms. If a man says, as admittedly

(1) (1906) 44 Sc. L. R. 255.

C. C. 50.

(2) (1899) 33 I. L. T. 183.

(4) [1900] A. C. 366.

(3) (1904) 6 Minton - Senhouse,

(5) 1 F. 855.

the appellant did say, "I claim compensation," why are we to conclude that he did not so claim? H. L. (E.)

1910

THOMPSON

v.

GOOLD & Co.

Lord Loreburn
L.C.

The reasoning for the respondents is that, unless a sum is named, the employer is deprived of an opportunity of settling the claim, and so avoiding proceedings under the Act. Surely, if he wants to know, he can ask the question, or he can make an offer himself. Perhaps the workman would answer, especially if he gave the notice immediately after the accident, that he cannot tell, until a little time has elapsed, what degree of injury he has sustained. If the Act had imposed upon a workman the duty of specifying the amount which he demanded when making the claim, it might have been thought unfortunate, because it would often make the workman ask, as a matter of prudence, for the maximum he could possibly recover. But I forbear from speculating what it would have been advisable for the Act to say. It is enough that the Act does not say the amount is to be specified, and, with all respect, we must construe it as it stands.

In my opinion, therefore, this appeal succeeds. I will add that, even if it were necessary to specify the amount, my present view is that the respondents waived that particular. But I should not so decide without further consideration, and the point does not arise in the view which I believe your Lordships take of the Act itself.

LORD ATKINSON. My Lords, in this case, which was under the Workmen's Compensation Act of 1897, the county court judge has found, amongst other things, (1.) that verbal notice of the accident was given by the workman to one Devereux, the manager of the works in which he (the appellant) was employed; (2.) that this notice was not formal in character; and (3.) that the want of a formal notice did not prejudice the employers in their defence.

It was not contended, it could not be contended successfully, that there was not abundant evidence in the case to sustain these findings.

The county court judge further found that the appellant made a claim for compensation verbally to the same Devereux, not,

H. L. (E.) however, stating the precise sum he claimed in moneys numbered, 1910 or in any other way specifically fixing it. This finding, like the THOMPSON other, is justified by the evidence. And Devereux himself proved v. that he had informed his employers of all that the appellant had GOOLD & Co. said to him. It must be taken, therefore, that the appellant's Lord Atkinson. employers were made aware, in a manner so specific as to enable them to make their defence, that the appellant had met with an accident in their works, and that he had claimed compensation in respect of it. So much is clear. It is not suggested that the appellant's employers or any person on their behalf ever made any inquiry from the appellant or any one who represented him as to what was the amount or nature of the compensation he claimed. It is, on the contrary, proved by the respondents' witnesses that the appellant's solicitor, one Broughton, since deceased, called upon the manager of the respondents at Carlisle, one Stubbs by name, for the purpose of making a claim on behalf of the appellant, and that Stubbs, though he "knew the appellant had had an accident," would not allow Broughton to discuss the case with him. And it is found by the county court judge, after hearing Stubbs, whom he considered a most unsatisfactory witness, that in his (the judge's) belief Broughton had on this occasion in fact made a "definite" claim for compensation on the appellant's behalf. It is not clear what is meant, in this connection, by the word "definite." It may be that it does not mean that Broughton stated the amount claimed in money. Two questions, therefore, emerge for decision—first, the general question, whether it is necessary that the amount of compensation should be stated in the claim, in order to make it a valid claim within the provisions of the 2nd section of the Act of 1897 (60 & 61 Vict. c. 37), and, second, the question whether the appellant was relieved from the obligation of stating the amount of compensation by reason of the conduct and action of the respondents' agent Stubbs.

It has been established by the authorities, and is not disputed, that the claim referred to in this section need not be in writing. A verbal claim is admittedly sufficient. It has also been established by authority and not disputed that the claim mentioned in this section is like the notice of the accident therein also

mentioned, a preliminary to the "proceedings for the recovery" mentioned in s. 2, and not part of the pleadings, if such they can be styled, in these proceedings. It is, to use the words of the Master of the Rolls in the present case, "something antecedent to and apart from the formal application required by the statute."

H. L. (E.)
1910
THOMPSON
v.
GOOLD & Co.
Lord Atkinson.

This was the point decided in your Lordships' House in the case of *Powell v. Main Colliery Co.* (1) The present point was not raised, and could not have been raised, in that case, for the simple reason that there the amount of compensation was precisely stated in the written claim; and I do not think that anything was said by any of the noble Lords who took part in the decision which, fairly construed, amounted to an expression of opinion on the point now raised. I should have myself thought that it was plain, upon the face of this statute, that the object of requiring notice of the accident to be served was to protect the employer from exaggerated or unfounded claims. Hence the requirement that the full particulars should be given, the right to have the workman examined (s. 1, sub-s. 3, of the First Schedule), and the proviso in s. 2, sub-s. 1, relieving the workman from the consequence of a defect or inaccuracy in the notice where the employer is not thereby prejudiced in his defence. And I should have thought it was equally plain that the main if not the only object of requiring the claim for compensation to be made within six months from the accident is to protect the employer from stale demands, to warn him that a claim is about to be made against him, and thus put him upon his guard, just as notice of action was designed to do the same thing in the case of those officials and public bodies who were under many statutes entitled to receive it. A notice of the accident does not involve a claim for compensation, or imply that such a claim will necessarily be made; for this amongst other reasons, that though the accident may occur, and notice be given of it as soon thereafter as practicable, no compensation will be recoverable unless the workman is by it incapacitated for a period of two weeks from earning full wages (s. 1, sub-s. 2 (a)).

(1) [1900] A. C. 366.

H. L. (E.)
 1910
 THOMPSON
 v.
 GOOLD & CO.
 Lord Atkinson.

Your Lordships have been referred to several cases decided in England, Scotland, and Ireland on this section of the Act of 1897. I have read the judgments delivered in each of them most carefully, and, with the most profound respect for the learned judges who decided them, I am unable to find in these judgments any line of reasoning convincing to my mind that the statement of the amount of the compensation claimed would have the powerful influence attributed to it in leading to a settlement of the workman's demand, or any explanation why, if this statement be an element of such potency, this statute, evidently framed to encourage settlement, did not expressly provide that the amount should be stated.

It does not appear to be a final and binding statement of the amount sought to be recovered. The amount claimed in the request for arbitration prescribed by r. 8 of the Rules of 1898 need not be the same. And the omission to name the amount is not mentioned in any of the rules or forms as a good ground of defence, though the omission to make the claim within the time prescribed is distinctly set forth in form 8, Appendix N, as a good ground of defence. It is scarcely conceivable that this would be so if the mention of the amount was a vital matter.

In all those cases in which the results of the accident have not fully developed themselves, or are not likely to develop themselves, within the period of six months from the date of the accident, and there are many such, it is obvious that the workman, if he is to state the amount of compensation, must, in self-defence, claim the maximum recoverable. Even where there is a doubt as to the probable duration of his incapacity to earn full wages, he must either do this or delay the making of the claim till the last moment—courses of action which would, I think, if anything, tend rather to impede than promote settlements.

The special advantage which the statement of the amount is said to possess is, according to the judgments of the learned judges in the Court of Appeal and of the other judges to which they refer, that it gives the parties "an opportunity to agree"; that when it is stated, if the master accedes to it, there is no dispute. I should a priori think that the occasions upon which

the employer gives everything he is asked to give are not very numerous. I should suppose that injured workmen, like most people who have a cause of action, do not confine their demand to the precise sum they are entitled to recover or would be content to receive, or the sum that the persons from whom they claim it would be willing to give. Such moderation in measuring the quantum of the relief they seek is not to be expected from them more than from others.

H. L. (E.)
1910
THOMPSON
v.
GOOLD & Co.
Lord Atkinson.

But if the amount be not stated, what is to prevent the employer from asking his workman how much he will take to settle, or from making the latter an offer? He has had all the information which the notice of the accident affords. Possibly he has availed himself of the provision in the First Schedule already mentioned and has had the workman examined. He is in a position to form a judgment on what is the amount which it is right or prudent for him to pay. It might, no doubt, be some advantage to him to have the amount stated in the claim. But, on the other hand, in cases such as I have already indicated, it would undoubtedly greatly embarrass the workman to be obliged to quantify, as it were, the redress he seeks, to force him in effect to fix by anticipation the duration of his incapacity and appraise the value in money of his possible sufferings. What I fail altogether to realize is that the advantage to the employer is so great as to render it imperative, in order not to defeat the purpose and object of the statute, to interpolate into its provisions words not to be found there, the more especially as the making of a claim serves the main and paramount purpose of protecting the employer against stale demands, even though no amount be mentioned. The essence of this requirement is the element of time.

The provisions dealing with the notice of this accident shew that where it is necessary for the protection of the employer that he should be in possession of full and detailed particulars the giving of those particulars is expressly enjoined. If, in the estimation of the Legislature, the statement of the amount claimed possessed all the virtues now attributed to it, I confess it seems to me incredible that it would not be dealt with as the notice of the accident is dealt with, and the statement of the

H. L. (E.) amount expressly enjoined. I find nothing in the letter or spirit
 1910 of the statute which requires that the amount should be stated,
 THOMPSON and on this ground I am of opinion that the judgment of the
 v. Court of Appeal is erroneous and should be reversed, and this
 GOOLD & Co. appeal allowed with costs.

Lord Atkinson.

It is therefore unnecessary for me to consider the second point, namely, whether Stubbs by his action did not relieve the appellant from stating the amount of compensation if that were essential. The inclination of my opinion, however, is that it did relieve him from doing so.

Little stress was laid in the argument before your Lordships on the effect of the use of the definite article "the" before the word "claim," instead of the indefinite article "a." In my opinion there is nothing in this point.

LORD COLLINS. My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with the judgments which have been delivered.

My Lords, there is no doubt that the Court of Appeal in England and the Court of Session in Scotland have found themselves lately confronted by a body of authority, and the state of that authority has produced a certain amount, not inconsiderable, of embarrassment. The Second Division of the Court of Session on May 16, 1899, pronounced a judgment in the case of *Bennett v. Wordie & Co.* (1), and though there were various grounds of that judgment, still it cannot be denied that a substantial ground was expressed by the Lord Justice-Clerk in the following terms: "A 'claim' in the sense of the statute means asking a particular sum as compensation for the injuries received, not merely intimating that the undertakers will be held liable—that is to say it is not in my opinion merely a general demand for compensation, but the taking of proceedings for making that demand effectual."

That was the state of the law in Scotland as decided by *Bennett v. Wordie & Co.* (1), but, my Lords, that state of matters there did not last very long, because upon June 11, 1901, in the

(1) 1 F. 855.

case of *Fraser v. Great North of Scotland Ry. Co.* (1), the same point also arose, and that most distinguished judge the late Lord President Kinross uses language of a very different complexion; because he says, with reference to the same provision of the Act, "The Act does not require, in terms at all events, that the amount of compensation shall be stated in the claim, but merely that a claim for compensation with respect to the accident shall have been made." And both he and Lord Kinnear expressly reserved their opinion upon that point.

H. L. (E.)
1910
THOMPSON
v.
GOOLD & Co.
—
Lord Shaw of
Dunfermline.
—

My Lords, the situation in Scotland was therefore this: that they had decisions apparently and to some extent in conflict; and under the Workmen's Compensation Act of 1897 an appeal to this House was precluded. In those circumstances the best was done which could be done, namely, seven judges were called together to decide the question; and that decision took place in December, 1906, in the case of *Kilpatrick v. Wemyss Coal Co.* (2) But, my Lords, when those seven judges were convened to decide that point, they held it to have been concluded by the authority of a judgment in this House, and that was the judgment in the case of *Powell v. Main Colliery Co.* (3)

My Lords, I am bound to say that I have the greatest difficulty in seeing how *Powell v. Main Colliery Co.* (3) can be held as a decision affecting the real issue in this case. The issue here is this: When a claim for compensation is made, must the claim not only be made, but must it be quantified? The question is, shall damages be quantified, and if not, is there or is there not a claim at all?

But, my Lords, in the very forefront of the case of *Powell v. Main Colliery Co.* (3), and brought out purposely by Lord Halsbury, who as Lord Chancellor delivered the leading judgment, the notice was quoted in extenso; and the notice leaves no room whatever for the point in this case or for the point in the previous Scotch cases, because the notice was in these terms: "Take notice that I claim the sum of 15s. per week from the 4th day of January, 1899." Accordingly, my Lords, in the case of *Powell v. Main Colliery Co.* (3) the question as to the need for

(1) (1901) 3 F. 908.

255.

(2) (1907) S. C. 320; 44 Sc. L. R.

(3) [1900] A. C. 366.

H. L. (E.) 1910
 THOMPSON v. GOOLD & Co.
 Lord Shaw of Dunfermline.

quantification in the notice could not possibly arise, because, as I say, upon the forefront of the notice the claim was already quantified at 15s. a week.

It is quite true that in the course of Lord Halsbury's judgment certain reference is made, apparently with approbation, to the case of *Bennett v. Wordie*. (1) And there being that obiter dictum, in that situation the seven judges in the case of *Kilpatrick v. Wemyss Coal Co.* (2) decided the question as concluded by the judgment of this House in *Powell v. Main Colliery Co.* (3) My Lords, there was no judgment of this House in the sense accepted by the seven judges in the Court of Session; but so far has that acceptance, in a wrong sense, of the judgment in *Powell v. Main Colliery Co.* (3) gone, that this present case now under appeal rests very largely upon the adoption by the Court of Appeal of the views of the Scotch judges in the *Kilpatrick Case* (2) as to the decision in *Powell v. Main Colliery Co.* (3)

Now, my Lords, as I have already shewn, that judgment did not and could not possibly rule the point in issue in this case; and I accordingly hold that I am forced to consider the question, not from the point of view of authority, but from the point of view of principle. Now the Master of the Rolls in this case cites with approbation the judgment of Lord Pearson, who, agreeing with Lord Dunedin, says this—and this is the principle upon which the judgment in the Scotch case (apart from authority) appears to depend—"I should say that, above all, the statute regards it as important that the parties should have an opportunity to agree, and so to save all the delay and expense of 'proceedings.'" My Lords, I have given, like my noble and learned friend Lord Atkinson, the most careful consideration to that line of reasoning; and, my Lords, I cannot find anything convincing to my mind in it. Although a claim be not quantified, there appear to me to be all the same opportunities, equal in strength, for a man, when he merely makes his claim, having his employer meeting him; the employer can then, in the very same way in which he could have done if the claim had been

(1) 1 F. 855.

(2) (1907) S. C. 320; 44 Sc. L. R. 255.

(3) [1900] A. C. 366.

quantified, meet the workman and say "Well, how much is the compensation to be?" H. L. (E.)

My Lords, if principle is to be appealed to, there are some reasons why the claim might not necessarily be quantified. What are those? Let me mention only two. The first of those reasons is, that necessarily before the time expires there are, in many cases, the greatest uncertainties with reference to the result of the injuries, and a prognosis estimable in money would be the merest and vaguest conjecture. In the second place, the statute prevents in a certain sense any wild claim, because it itself provides a maximum. In those circumstances there seems to be no reason whatever on principle for compelling the initial quantification of a claim. To hold that the words of the statute "the claim for compensation" must mean "the claim for a specific sum of money by way of compensation" appears to me to make an unjustifiable addition to what the Act prescribes. In the present case it is clearly found that the appellant although not naming a sum did in fact make a claim for compensation within the statutory limit of time, and he thus, in my opinion, completely satisfied all that the Act required.

My Lords, I have traversed the authorities and discussed the principle at such length because of the great care manifested both in the Court of Appeal and in the Court of Session on the topic. I add that I agree, if I may respectfully do so, with every word of the analysis made by my noble and learned friend Lord Atkinson of the statute in this particular respect.

LORD MERSEY. My Lords, the only question argued on the hearing of this appeal was whether the appellant had made a "claim for compensation" sufficient in law to comply with the requirements of the Workmen's Compensation Act, 1897. The learned county court judge decided that he had, and gave judgment for the appellant. The Court of Appeal came to the conclusion that he had not, and entered judgment for the respondents.

The facts are quite simple. While working for the respondents the appellant lost the sight of one of his eyes by an accident within the meaning of the statute. What happened

1910

THOMPSON

v.

GOOLD & Co.

Lord Shaw of
Dunfermline.

H. L. (E.) subsequently is stated by the respondents in paragraph 4 of their case, "the appellant within six months of the date of the alleged accident said to the works manager 'I claim compensation' but the appellant did not at any time specify the amount of his claim."

1910

THOMPSON

^{v.}
GCOLD & Co.

Lord Mersey.

The question is whether such a claim comes within the meaning of s. 2, sub-s. 1, of the Act, which provides that proceedings for the recovery of compensation shall not be maintainable unless "the claim for compensation" has been made within six months of the happening of the accident. The fault which the respondents find with the claim is that it does not name the sum of money for which it is made; and it is said that this fault is fatal. My short answer to this contention is that the Act contains no words which require the workman to mention a sum of money.

But then it is said that the Act of Parliament cannot be administered properly unless such words be read into it; for that it contemplates an opportunity being afforded to the master of settling the claim, and so avoiding arbitration proceedings, and that such opportunity is not afforded unless the workman says how much he wants. This reasoning does not satisfy me. It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do. Here I see no necessity at all for introducing the words.

The absence from a claim for compensation of a named sum does not prevent the workman from saying how much he will accept, nor does it prevent the master from saying how much he will give. Preferring a claim for compensation is by no means a necessary preliminary to arriving at an agreement as to the amount to be paid. What the workman is willing to take, or the master willing to pay, may be something quite different from the measure of compensation. Many considerations may induce a man to take less or a master to give more than "compensation." If the parties fail to agree, or do not try to agree, then it is that compensation has to be fixed; and the tribunal to fix it is the county court. Why should the workman undertake the task? Why may he not tell what is probably the truth, and say

"I cannot fix any sum, for I am not skilled enough to form an opinion as to the nature of my injuries, or clever enough to measure them in money"? There is, in fact, no good reason why he should not take up this position.

It is said, however, that the case is settled by authority, and reference is made to a number of cases, among which is the Scotch case of *Kilpatrick v. Wemyss Coal Co.* (1) In that case it was undoubtedly held that the claim for compensation to be good must mention the sum claimed. But it will be noticed that the decision is largely based on dicta to be found in *Powell's Case*, decided in this House and reported in [1900] A. C. at p. 366. Those dicta, however, were obiter, and I do not think they bind your Lordships' House, even if they go to the length suggested.

For these reasons I come to the conclusion that there is nothing in the Act of Parliament, and nothing in the authorities, which constrains your Lordships to arrive at a decision which, if arrived at, would deprive the appellant of the remedy to which otherwise he is undoubtedly entitled.

I wish further to add that, in my opinion, the respondents by their conduct, as appearing from the evidence of their own witnesses, dispensed with the naming of any sum by the appellant, and thereby estopped themselves from objecting to the form of the claim.

LORD LOREBURN L.C. My Lords, I am afraid that, owing to a mistake, my noble and learned friend Lord Halsbury has not been apprised that this case was coming on for consideration to-day, but as the parties were here we did not think it desirable to put them to the expense of coming again.

Order of the Court of Appeal reversed and award of Judge Steavenson restored with all costs below; the appellants' costs here to be upon the pauper scale.

Lords' Journals, June 9, 1910.

Solicitors: *Thwaites & Thompson, for J. B. Beckton, Carlisle; Indermaur & Brown, for Blackburn & Main, Carlisle.*

(1) (1907) S. C. 320; 44 Sc. L. R. 255.

H. L. (E.)
1910
THOMPSON
v.
GOULD & Co.
Lord Mersey.

[HOUSE OF LORDS.]

H. L. (E.) KIRKWOOD APPELLANT ;
1910
June 10. GADD RESPONDENT.
AND

Money-lender—Business carried on at other than Registered Address—Loan effected at Borrower’s Residence—Illegality—Bill of Sale—Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2, sub-s. 1 (b).

The Money-lenders Act, 1900, in requiring that a money-lender “shall carry on the money-lending business in his registered name and in no other name and under no other description, and at his registered address or-addresses and at no other address,” does not mean that every stage and every incident of every piece of the money-lending business is to be transacted at the registered office.

The question is a question of fact, not of law, and must be answered according to the circumstances of the case.

Decision of the Court of Appeal, [1909] 2 K. B. 353, reversed and the interim injunction discharged.

THE circumstances of this appeal are stated in the judgment of Lord Mersey.

Sir Robert Finlay, K.C., and Montague Lush, K.C. (Shearman, K.C., W. de B. Herbert, and J. B. Matthews with them), for the appellants.

Ritter and W. H. Jones (Allan Ramsay with them), for the respondent.

The arguments urged on both sides are fully stated in the report of the decision below and dealt with in this House. No fresh authorities were cited ; it will be observed that the ultimate decision after consideration was wholly on the facts.

June 10. LORD LOREBURN L.C. My Lords, in this case an interim injunction has been granted by the Court of Appeal to prevent a money-lender from taking possession under a bill of sale, upon the ground that the agreement for the loan, the advance of the money, and the taking of the security were all transacted not at the money-lender’s registered address but at the borrower’s private residence. It was so in fact, upon the materials before us, but

some letters making the appointment at the borrower's residence with a view to arranging the loan were written to and received from the registered address.

Your Lordships are asked to say whether or not the arrangement of the loan in this way was contrary to the Money-lenders Act, 1900. I expressly limit my opinion to that point, which alone has been argued before us.

H. L. (E.)

1910

KIRKWOOD

v.

GADD.

Lord Loreburn
L.C.

The 2nd section of the Act, sub-s. 1 (b), requires that a money-lender "shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address." Sect. 2, sub-s. 2, also provides that "If a money-lender . . . carries on business . . . elsewhere than at his registered address or fails to comply with any other requirement of this section," he shall be liable to fine or imprisonment for a second offence as prescribed.

This enactment contains a positive direction, that the man shall carry on the business at the registered address. It also contains a negative one, that he shall not carry on business elsewhere.

What is carrying on business? It imports a series or repetition of acts. Each separate piece of business may consist of many stages and incidents, and the business as a whole comprises many separate pieces. This Act of Parliament cannot mean that every stage and every incident of every piece of the money-lending business is to be transacted at the registered office. That would be impossible, for such things as making inventories or taking possession of furniture under a bill of sale are part of the business and must be done where the goods are situated. Nor can it be intended to prohibit the employment of clerks and agents, or the transaction outside the registered address of every single thing that could by possibility be transacted within it. That would be needlessly oppressive and would strain the words. We must look at the nature of the mischief disclosed according to the approved canons of statutory construction. The mischief is that this dangerous business may be conducted by persons under false names or a variety of names without the security of an ascertained address, or at places where men may be taken

H. L. (E.) unawares or off their guard. The words, which are in terms
1910 general, must be applied accordingly.

KIRKWOOD
v.
GADD.

Lord Loreburn
L.C.

I do not propose to define what is meant by carrying on business lest I may facilitate evasion. But I do think that if a money-lender really deals with a borrower at his registered address, whether by interview or correspondence, he may, without infringing the Act, transact negotiations, or conclude the actual contract, elsewhere.

If, however, the money-lender employs an agent to frequent markets, or call upon individuals in order to procure borrowers, and thereupon a money-lending transaction, even a single transaction, goes through without the borrower being brought into communication with the registered address till after the transaction is completed, it might amount to carrying on business elsewhere than at his registered address. There may be many cases betwixt and between.

It is always a question of fact, the answer to which depends on the circumstances of the case.

I can see that nice points may arise in applying this section of the Act. It must be so inevitably when general language of this kind is used in the Act. But such points are not matter of law if there is evidence to support the conclusion. They are points of fact and should be so regarded.

I do not think that this is a case in which an interim injunction should be granted. So far as I can see on the materials before us, this piece of business was directed and controlled at the registered address, and the borrower dealt with the lender at the registered address. I do not prejudge it, however, and it must be decided on actual evidence at the trial.

As there are other matters to be disposed of at the hearing which were not argued here, the parties have agreed to an undertaking, and I move your Lordships to dissolve the injunction, all costs here and below to be costs in the cause.

LORD JAMES OF HEREFORD. My Lords, it is necessary in order to determine the question raised by this appeal that the facts controlling the case should be ascertained and stated.

In February, 1908, the appellant John Kirkwood was carrying

on the business of a money-lender at Ipswich, and for the purpose of so doing had registered an address, "30, Upper Brook Street, Ipswich." On February 2, 1908, one Dobson, a commission agent, wrote to the appellant stating that the respondent required a loan of 100*l.*, giving a bill of sale on his furniture as security. In this letter, which was sent to the above address, Dobson assumed that the appellant would send an agent to Ilford, where the respondent resided.

After some delay the transaction was carried out. The statement of what occurred is apparently correctly stated in the appellant's case as follows: "In due course the said Herbert Sandoe (appellant's agent) called upon the respondent at the residence of the respondent, No. 59, Mayfair Avenue, Ilford, in the county of Essex, and the terms of the proposed loan were then arranged between the said Sandoe and the respondent, and the said Sandoe, the appellant's agent, drew up the said bill of sale, which was executed by the respondent, and the said Sandoe advanced and paid to the respondent the sum of 100*l.*, being the consideration for the said bill of sale."

The circumstances thus narrated occurred at Ilford, and the respondent's wife also there signed a declaration that she had no interest in the furniture assigned by the bill of sale.

In relation to payments under the bill of sale and other matters a very voluminous correspondence (set out in the appendix) took place. Throughout it the only address affecting the appellant was the registered Ipswich address.

Default was made in fulfilling the terms of the bill of sale whereupon the appellant took possession of the goods assigned by it.

Application was then made by the respondent to a learned judge (Hamilton J.) to restrain the appellant's proceedings on the ground that he had carried on business at an address other than the registered address, and that therefore the bill of sale was void. The learned judge refused the application, but on appeal Fletcher Moulton and Farwell L.JJ. held that the respondent's contention was correct and granted the application.

The basis of the judgment so arrived at seems to be that the

H. L. (E.)

1910

KIRKWOOD

v.
GADD.Lord James of
Hereford.

H.L. (E.) proceedings at Ilford in February, 1908, amounted to a carrying
 1910 on of business by the appellant at an address other than
 KIRKWOOD 30, Upper Brook Street, Ipswich, and also that "such carrying on
 of business" constituted a penal offence within the provisions of
 s. 2 of the Money-lenders Act, 1900, which enacts that "A
 money-lender as defined by this Act shall register himself as a
 money-lender . . . under his own or usual trade name, and in
 no other name, and with the address, or all the addresses if more
 than one, at which he carries on his business of money-lender,
 and shall carry on the money-lending business in his registered
 name and in no other name, and under no other description, and
 at his registered address or addresses, and at no other address,
 and shall not enter into any agreement in the course of his
 business as a money-lender with respect to the advance or repay-
 ment of money or take any security for money in the course of
 his business as a money-lender, otherwise than in his registered
 name."

Lord James of
 Hereford.

Now in order to apply the above provisions it is advisable to consider what was the object of them.

Guided by the words of the Act, I would surmise that the object of the Legislature was to preserve the identity of the money-lender so that borrowers might always know with whom they were dealing. To secure that the money-lender should trade in only one name, and carry on business at only one address, would do much, and has done much, to establish the desired personal identity of the persons with whom borrowers were dealing.

It must, however, be noted that by the concluding words of the section certain transactions necessary to the carrying out of a loan are dealt with, and they are specifically required to be effected in the registered name, but not at the registered address, of the money-lender. If these transactions are included in the words "carrying on of business," these last provisions would be unnecessary.

But in whatever spirit the words of the statute are to be read, a construction must be put upon them, and they must be applied to the facts established in this case. What, then, is the meaning that should be attached to the words "carrying on business"?

I decline to formulate any definition of those words. Dangerous consequences might result from doing so, but I accept the responsibility of saying whether it has been shewn that the appellant has carried on business at an address other than his registered address.

H. L. (E.)
1910
KIRKWOOD
v.
GADD.

Lord James of
Hereford.

In my opinion such proof has not been given. The visits to the respondent's house in February, 1908, and the acts that took place there, were for the purpose of carrying out a particular transaction, and some of the acts were necessarily or more conveniently transacted there. In relation to a money-lender's business, I presume that some portions of it cannot, or would not, be transacted at the lender's registered place of business.

For instance, when a bill of sale is given as security for a loan, the goods assigned must be inspected, and a value estimated and an inventory made. For carrying out such objects the lender or his agents must visit the tenement where the goods are. Can it be said that such a visit constitutes a carrying on of business (within the meaning of the statute) at any tenement to which such visits are so made ?

If such were the case a money-lender would be prohibited from calling upon a proposed borrower, from testing his position in his home, or from taking the steps mentioned above.

Then again it may be very advisable that the borrower should be identified and the money lent should be paid over to him personally. Can the Legislature have intended to say that every act connected with the carrying out of a money-lending transaction, as distinguished from the general carrying on of business, must compulsorily take place within the four walls of the registered address ? If such had been said, in many instances business could not be carried on. Any person unable to travel from sickness, or age, or any other incapacity, would be prevented from borrowing from a money-lender.

It is true that in this case the bill of sale was executed, and the money lent advanced, at Ilford. But surely when the lender's agent and the borrower met at Ilford it would have been somewhat absurd if they were prevented from completing the transaction, and a forced journey to Ipswich undertaken by the borrower.

H. L. (E.)
 1910
 KIRKWOOD
 v.
 GADD.
 Lord James of
 Hereford.

As I have said, I decline to give a definition of the meaning of the words "carrying on business" used in the statute. I repeat that it would be dangerous to do so. Evasion might follow. I can understand an ingenious method of evading or breaking the statute being resorted to, as by a system of canvassing for business from house to house, and a definition may tend to protect such proceedings.

But instead of giving a definition, I suggest that each case should be determined as it arises, and thus I decide this case upon the facts presented to your Lordships.

In my opinion, as I have said, there is no proof that the appellant has carried on business at any address other than the Ipswich registered address. Certain portions of one transaction were carried out at Ilford, but these could not possibly result in giving to the appellant any right to use the respondent's house as his address.

The strict words of the statute, common sense, and the necessities of commercial transactions combine to cause me to come to the conclusion that the Legislature could not have intended to impose upon money-lenders who have acted under the conditions of this case the liability to be subjected to the results contended for by the respondent.

I therefore am of opinion that this appeal must prevail.

LORD ATKINSON. My Lords, the appellant in this case is a money-lender. He is duly registered under the Money-lenders Act. His registered address at Ipswich, at the date of the loan hereinafter referred to, made by him to the respondent, was 30, Upper Brook Street. It is now 64, St. Matthew's Street. And his registered name is The Provincial Union. The appellant has other registered addresses, but this is the only address which it is material to take note of for the purposes of this appeal. The respondent, who is a retired bank manager residing at 59, Mayfair Avenue, Ilford, carrying on the business of an insurance broker in the city of London, in the month of February, 1908, put himself into communication with one Dobson, who is described as a commission agent by the appellant's counsel, and as a money-lender's tout by the respondent's, to obtain for him

a loan, 100*l.*, secured by a bill of sale on his furniture. It does not appear whether the respondent directed Dobson to deal with the appellant in particular, or whether the latter was Dobson's selection. He must, however, have furnished Dobson with an inventory of the furniture which was to be included in the bill of sale, and disclosed to him some of the particulars of his, the borrower's, financial position.

The negotiation which culminated in the loan and the bill of sale, which has been impeached as illegal and void, was initiated by the receipt by the appellant at his registered office at Ipswich of a letter from Dobson enclosing the inventory setting forth the particulars above mentioned, and applying on the respondent's behalf for the desired loan.

On February 15, 1908, one Herbert Sandoe, the appellant's manager, wrote to the respondent the following letter :—" Provincial Union Bank, 30, Upper Brook Street, Ipswich, 15th February, 1908. Mr. A. E. Gadd. Dear Sir,—With reference to your application for an advance per Mr. Dobson, we have instructed one of our officials to call upon you on Monday morning about 11.30 when kindly arrange to be at home and if you have not already ascertained the exact amount the Metropolitan Company will accept in settlement of your bill of sale please get this information before our official arrives. Yours truly, Herbert Sandoe, Manager." A reply to which, in the terms following, was received by the appellant at his registered address, 30, Upper Brook Street, Ipswich :—" 59, Mayfair Avenue, Ilford, Essex, Feb. 16th, 1908. The Manager, Pro. Union Bank, Ipswich. Dear Sir,—I beg to acknowledge receipt of your favour of yesterday's date and to say I will be at home to-morrow (Monday) at 11.30 A.M. to meet your representative as desired. I am, yours faithfully, A. E. Gadd." It appears Sandoe was unable to keep this appointment. He accordingly sent to the respondent a letter, dated February 17, 1908, and addressed, as the previous letter had been, from the appellant's registered address, to which the respondent replied by wire, " Will be at home. Gadd, Ilford." This telegram was addressed " Advance, Ipswich," the telegraphic address of the appellant, and was received at 30, Upper Brook Street.

H. L. (E.)

1910

KIRKWOOD

v.
GADD.

Lord Atkinson.

H. L. (E.)
 1910
 KIRKWOOD
 v.
 GADD.
 Lord Atkinson.

Sandoe accordingly attended at the respondent's residence on February 20, and brought with him the bill of sale and the money to be lent. He got the former executed and handed over the latter, obtaining therefor a receipt, and presumably checked the inventory. In the bill of sale the grantee is described as "the Provincial Union Bank of 30, Upper Brook Street, Ipswich (of which said bank John Kirkwood of the same place is sole proprietor)." In view of these facts there is not, there cannot be, a pretence for suggesting that the identity of the appellant was in any way concealed. The respondent knew his registered name, his registered address, and the nature of the business he purported to carry on there. These are the very things which it was, in my view, the design and purpose of the Money-lenders Act should be brought home to the knowledge of those who borrow from money-lenders. The special mischief against which that statute was directed does not exist in this case. The borrower, therefore, had all the information which was necessary to enable him to ascertain with certainty who was the person with whom he dealt, and the place where that person purported to exercise his calling.

It is quite true that the final stage of the transaction, the handing over of the money and the perfecting of the security, was completed at the borrower's address, and not at the money-lender's registered address; but all the earlier stages of the transaction were carried out by a correspondence addressed to and written from the borrower's address and the lender's registered address respectively; the whole dealing was brought into touch with the registered address at every stage, and indeed it was, as I understood, admitted by the respondent's counsel in argument, that had the money been paid to his client by the appellant's cheque sent by post, and had the draft bill of sale also been sent by post to his client, executed by him at his residence, and returned by post to the appellant's registered address, the appellant should be held to have carried on his business of money-lending in this instance at his registered address, would then have committed no wrong, and the security he obtained would have been valid and unimpeachable. But it is argued by the same counsel that because the bill of sale and the money

were carried to his client by the appellant's manager, the money handed over, and the security executed at the client's residence, the whole transaction is impeachable, the security invalid, and the appellant guilty of the criminal offence of carrying on business elsewhere than at his registered address, for which offence a fine of 100*l.* might be imposed upon him if it were his first offence, and he might be imprisoned for three months if it were his second offence. My Lords, it appears to me that in this argument the main purpose of the Legislature is lost sight of, and if it were to prevail the statute would be reduced to an absurdity.

H. L. (E.)
1910
KIRKWOOD
v.
GADD.
Lord Atkinson.

Your Lordships have not now to decide whether the bill of sale, which the appellant has been restrained by the Court of Appeal from putting in force by seizure of the furniture mentioned in it, has been rendered void. The sole question for decision is whether by reason of what took place at the respondent's residence on February 20, 1908, the appellant should be held to have carried on "business" elsewhere than at his registered address, and thereby committed the criminal offence mentioned in s. 2, sub-s. 2, of the Money-lenders Act.

The word "business" is used, as I think, to designate the business mentioned in the previous sub-section.

In one sense every step, every item, in a long or complicated financial or commercial transaction may be said to be "business," but I think it is obvious that in the phrase "carries on his business" employed in this section, as in the phrase "carrying on business" employed in the 4th section of the Companies Act of 1862, the words "carries on" must be held to imply a repetition of acts, the sum of which constitutes the "business": see Brett L.J., *Smith v. Anderson*. (1)

The money-lender's trade is in itself a lawful trade. And it is, I think, no more essential in this than in any trade or business that every act necessary to complete a contract of the class which it is the purpose and object of the trader to enter into and carry out should be performed on the premises of the latter, in order that his trade may be correctly described as being "carried on" in those premises.

(1) (1880) 15 Ch. D. 247, at pp. 277, 278.

H. L. (E.)
 1910
 ~~~~~  
 KIRKWOOD  
 v.  
 GADD.  
 ~~~~~  
 Lord Atkinson.

If one takes by way of example the case of a house decorator, or of an ordinary retail dealer, who delivers at the house of his customers the goods he sells, it could scarcely be seriously contended that the former carried on his business at the houses belonging to his customers, which he decorates, or the latter at the houses of his customers, where he delivers his goods. I fail to see on what principle the words when applied to a money-lender should be used in a sense and meaning so much narrower than that which they bear when applied, in the ordinary use of language, to other traders, unless, indeed, it is to be assumed that it was the paramount object of this statute to prohibit all communication between a money-lender and his customer on business matters by post or telegraph, and oblige the borrower to frequent the registered house or office of the lender and carry out there every detail of each transaction—an assumption for which there is, in my opinion, no warrant to be found in its provisions.

I agree with the contention of Sir R. Finlay, that if the obtaining, on behalf of a money-lender, the execution of a bill of sale in the house of a borrower be the “carrying on” by the former of his business in that house, then sub-s. (c) is mere surplusage, because by the previous sub-section it is already provided that the lender can only carry on his business in his registered name. Sub-s. (c) obviously applies to an isolated transaction of the kind described, and can only have been introduced because the doing of the thing mentioned in it does not amount to a “carrying on” of business within the meaning of the section.

It is impossible to define with fulness or accuracy what is the precise meaning to be given to the phrase “carrying on business.” It is to a large extent a question of fact, to be determined in each case by its own special circumstances. Little assistance can be gained from the authorities.

But this much I think is clear, that “carrying on” business does not necessarily include carrying out the contracts it is the business of the merchant, retail dealer, or money-lender to enter into. In every money-lending transaction in which land, houses, or furniture is mortgaged or pledged as a security, the important step of inspecting and so verifying the existence of the property

must be carried out elsewhere than at the money-lender's address : H. L. (E.)
see *Erichsen v. Last* (1), approved in *Grainger v. Gough*. (2) 1910

Neither can it require that those contracts should necessarily be entered into on the premises where the business is "carried on"; else the acceptance of a tender or offer which completed the contract could not be communicated by post or telegraph. And, without attempting to fully define the meaning of the phrase, I may say that I think the place at which a merchant or trader must be understood to carry on his business is the headquarters, as it were, of the business, or the headquarters of a particular branch of it, in which the conduct of the business, or of the branch, is regulated, directed, and controlled, and the transactions which constituted it are recorded. In the case of a money-lender it is not, in my view, necessary, as I have said, that every important step in the dealing between him and his customer should be carried out at the registered address of the money-lender.

It will, I think, suffice if such important portions, or such an important portion, of the dealing are or is transacted there by communications, verbal or written, as will necessarily reveal to the borrower the identity of the money-lender, the nature of his business, and the registered address at which he purports to carry it on. Whether one isolated transaction carried out by a money-lender from its inception to its completion at a place other than his registered address amounts or does not amount to the crime of carrying on business elsewhere than at his registered address, within the meaning of the statute, must depend on the particulars or circumstances attending the transaction. The carrying out of one such transaction does not necessarily amount to an offence, but circumstances are conceivable where it might amount to it; for instance, if it were proved that a money-lender, either personally or by his agent, held himself out as ready to do business at a particular place or at particular places other than his registered address, or canvassed for business to be transacted at such place or places, and in consequence of that holding out or canvassing succeeded in getting a borrower to enter there into the isolated transaction impeached, I am inclined to think the

(1) (1881) 8 Q. B. D. 414.

(2) [1896] A. C. 325, at p. 335.

H. L. (E.) money-lender might rightly and justly be held to have carried
 1910 on his business elsewhere than at his registered address, so as to
 KIRKWOOD be guilty of the crime against which the statute is directed.
 v.
 GADD.
 Lord Atkinson.

For the reasons already given I am of opinion that the decision of the Court of Appeal was erroneous and should be reversed.

I concur as to the form of the order to be made as suggested by the Lord Chancellor.

LORD SHAW OF DUNFERMLINE. My Lords, I have had considerable doubts in this case. In the judgments to which I have had the pleasure of listening, and which I formerly had the pleasure of reading, I observe that a definition of what is "carrying on business" under this statute is avoided. I observe further that certain proceedings will have to be taken in this cause for the facts to be more fully investigated. Under those circumstances I must entirely agree with the judgment pronounced by my noble and learned friend Lord James of Hereford. It does appear to me that each case must depend upon its own facts, the elementary principle being kept in mind that the Act is to be enforced in all respects, and in no respect evaded.

LORD MERSEY. My Lords, the facts of this case are as follows, The appellant, Kirkwood, is a money-lender. His place of business is at 30, Upper Brook Street, Ipswich, and his trade name or description is "The Provincial Union Bank." Both the name and the address are duly registered in accordance with the provisions of the Money-lenders Act, 1900. On February 11, 1908, a man named Dobson wrote a letter to Kirkwood, and sent it to his place of business at 30, Upper Brook Street, Ipswich. The letter enclosed an inventory of some furniture upon which the owner desired to raise a loan. The name of the proposed borrower was not given in this letter, but it was furnished by Dobson a few days later in a telegram, which was also sent to Kirkwood's place of business.

The telegram reads as follows: "Alfred Ernest Gadd, 59, Mayfair Avenue, Ilford, Insurance and Mortgage Broker." Having thus received the name and address of the proposed

borrower, Kirkwood, by his manager, Herbert Sandoe, wrote to Gadd to say that one of the officials of the so-called bank would call on Gadd with reference to the application for a loan. On this some further correspondence took place between Sandoe and Gadd, the outcome of which was that Sandoe met Gadd at Gadd's house on February 20, and there and then arranged the terms on which Kirkwood should make the loan. Having arranged the terms of the loan, he proceeded to check the inventory of the furniture, and drew up a bill of sale which Gadd executed. It is sufficient to say of it that it describes the grantee as "the Provincial Union Bank, of 30, Upper Brook Street, Ipswich (of which said bank John Kirkwood, of the same place, is sole proprietor)," and that the attestation clause describes the document as having been executed by Gadd "in the presence of me Herbert Sandoe, of 30, Upper Brook Street, Ipswich, manager of the Ipswich branch of the Provincial Union Bank, 30, Upper Brook Street, Ipswich."

Sandoe then paid the amount of the loan to Gadd and took a receipt. The correspondence so far as it consisted of letters written for or by Kirkwood was sent from and bore the address of the Provincial Union Bank, Ipswich, and it was to that place that Gadd sent the letters which he wrote. Dobson was paid a commission by Kirkwood in respect of the introduction of Gadd. This was the only transaction with Gadd, but it appeared that, although it was not usual to do so, the appellant had carried out transactions at the houses of borrowers on several other occasions. The instalments by which the debt was to be paid off fell into arrear, and on May 19, 1909, Kirkwood threatened to seize the furniture under the power contained in the bill of sale. Thereupon Gadd issued a writ claiming an injunction to restrain Kirkwood from seizing, and also claiming a declaration that the bill of sale was invalid. On the same day Gadd applied ex parte to the judge at chambers (Hamilton J.) for an interim injunction and used an affidavit in support. This affidavit contains the following statement:—"The whole of the transaction was carried out and completed at my private address, 59, Mayfair Avenue, Ilford, the alleged bill of sale being executed there and the money paid over." The learned judge refused to make any order.

H. L. (E.)

1910

KIRKWOOD

v.

GADD.

Lord Mersey.

H. L. (E.)

1910

KIRKWOOD

v.

GADD.

Lord Mersey.

Next day, May 20, 1909, the Court of Appeal granted leave to appeal, and on May 21 the appeal was heard. The facts as I have stated them were either admitted or proved to the satisfaction of the Court, and the Court thereupon found that the transaction was bad on the ground that it amounted to a carrying on of business by the money-lender elsewhere than at his registered address in contravention of s. 2 of the Money-lenders Act, 1900. The appeal was accordingly allowed, and the Court granted an interim injunction until the trial of the action upon the usual undertaking as to damages. It is from this decision that the present appeal is brought to your Lordships' House.

It is an appeal which raises a question of very serious importance to the appellant, for if the injunction be made perpetual on the grounds mentioned he will not only lose his remedy for the recovery of the money he has lent, but he will also be liable to conviction and fine for the offence that he has committed, and in the event of conviction will run the risk of imprisonment if he should be again convicted in respect of another similar offence.

The real question in the case is this : Do the facts afford any reasonable evidence that the appellant carried on business elsewhere than at his registered address ? Not that he did business elsewhere, but that he carried on business elsewhere.

The words of s. 2 of the Act are as follows : " A money-lender (a) shall register himself as a money-lender under his own or usual trade name, and in no other name, and with the address at which he carries on his business of money-lender, and (b) shall carry on the money-lending business in his registered name, and in no other name and at his registered address or addresses, and at no other address, and (c) shall not enter into any agreement in the course of his business as a money-lender, with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name." The section further enacts that " if a money-lender fails to register himself or carries on business otherwise than in his registered name or elsewhere than at his registered address, or fails to comply with any other requirement of this section, he shall be liable on conviction to a fine

not exceeding one hundred pounds, and, in the case of a second or subsequent conviction, to imprisonment with or without hard labour for a term not exceeding three months."

Examining this section of the Act, it will be noted that while it prohibits the money-lender from carrying on the money-lending business otherwise than in his registered name, or elsewhere than at his registered address, it contemplates the possibility of the money-lender having to enter into transactions "in the course of his business as a money-lender"; and singling out two, namely, entering into an agreement with respect to the advance and repayment of money, and taking a security for money, it enacts that they shall not be entered into otherwise than in the money-lender's registered name. Not a word is said in this part of the section as to the registered address. It is apparently enough to satisfy the requirements of the Act that the transactions mentioned should be in the registered name. This, in my opinion, indicates that the carrying on of the business spoken of in the Act of Parliament is something quite different from the carrying out of the transactions which make up the business.

The carrying on must be at the registered address. The carrying out may be wherever convenient. What the money-lender did in the present case was to enter into an agreement "in the course of his business as a money-lender," with respect to the advance and repayment of money, and also to take a security for money "in the course of his business as a money-lender," and he did both in his registered name. He adhered to the spirit and to the very letter of the Act. It is true that he did more. He checked an inventory at the only place he could check it, namely, on the borrower's premises; and he handed over the amount of the loan there. And why should he not? The only words in the Act which can be invoked to shew that he might not are the words which forbid him to carry on his business elsewhere than at his registered address, or otherwise than in his registered name; but if these words are intended to have such an effect as that contended for, it is impossible to understand the necessity of the express provision as to agreements and securities. I think, too, that the

H. L. (E.)

1910

KIRKWOOD

v.

GADD.

Lord Mersey.

H. L. (E.) 1910
KIRKWOOD
v.
GADD.
Lord Mersey.

interpretation which I give to the statute is the only one which is consistent with business. If "carrying on the business" is to be read as meaning the carrying out of the transactions which go to make up the business, then, unless the borrower can come to the money-lender's registered address, no business can be done. A bedridden man could not have recourse to a money-lender, for he would be physically incapable of going to the money-lender, and the money-lender could not lawfully come to him. This would be a result which the Legislature never intended.

But I prefer to put the matter on a broader ground. A man's business is carried on at the shop or office where he keeps his books, his stock, and his cash, and to which he, his servants or clerks resort, either to work or to receive directions as to their work. Some of the work may of necessity or for convenience be done away from the shop or office, but the business is none the less carried on at the office or shop. Take, for instance, the case of a butcher. He has his shop where he keeps the meat he sells. He sends his servant round in the morning to the houses of his customers to collect orders, and in the afternoon he delivers the meat in fulfilment of the orders. Could it be said that such a man carries on business elsewhere than at his shop? I think not.

Then I think the object with which this statute was passed is to be remembered. It was not passed either to hinder or to prevent money-lending as a business. It was passed merely to defeat the frauds and to correct the abuses which sometimes attend the business, and with that object in view it requires that the money-lender shall not trade under a changing name or at a shifting address. Gadd knew from the first with whom he was doing business and where the money-lender was to be found, and it was for his convenience that the transaction was carried out at his own address. It is also to be remembered that the statute is penal, and that if the injunction stands the money-lender becomes liable to a conviction and a fine. Nothing but plain and unambiguous language in the statute ought to be allowed to lead to such a result. I can find no such language. In my opinion the acts done by the money-lender in this

case neither violated the spirit of the Act nor contravened its terms. H. L. (E.)

Order of the Court of Appeal reversed and order of Hamilton J. restored; the costs here and below to be costs in the cause.

1910
KIRKWOOD
v.
GADD.

Lords' Journals, June 10, 1910.

Solicitors: *Windybank, Samuel & Lawrence; John K. Torkington.*

[HOUSE OF LORDS.]

FAMATINA DEVELOPMENT CORPORATION, }
LIMITED AND OTHERS } APPELLANTS ;

H. L. (E.)

AND

1910
June 14.

BURY RESPONDENT.

Company—Income Bond—Construction—Bonus payable out of Profits—No Profits earned—Issue of paid-up Shares in Exchange for Bonus—Dividends out of Capital—Want of Consideration—Ultra vires.

A limited company being in want of money borrowed it by the issue of 10*l.* bonds on the terms that the company would when and so far as there were net profits available for the purpose pay to the bondholder the principal money of 10*l.* together with a bonus of 25*l.*, the principal money and bonus to be paid exclusively out of profits.

Years later, the company having made no profits whatever and being still in want of money, it was arranged with the consent of all parties interested that new 1*l.* shares should be issued and the bonus of 25*l.* satisfied or extinguished by the allotment of twenty of the new 1*l.* shares considered as fully paid :—

Held, that it was ultra vires for the company to make the charge on future net profits a charge on capital and a present debt and to issue shares fully paid up in satisfaction of the debt so created, the charge being exclusively on income.

Quære whether it is possible for directors to create a debt against their company and to saddle their company with it for the purpose of enabling them to issue shares without payment in cash, however advantageous they may consider the transaction to be.

Decision of the Court of Appeal, [1909] 1 Ch. 754, affirmed.

THE facts are fully told in the judgment of Lord Macnaghten.

March 11, 15. *Romer, K.C.*, and *Ward Coldridge*, for the appellants. The corporation was entitled to discharge out of its

H. L. (E.)
 1910
 FAMATINA
 DEVELOP-
 MENT
 CORPORA-
 TION,
 LIMITED
 v.
 BURY.

assets generally a liability which its creditor could only enforce against available profits, that right having been expressly stated in condition 13 indorsed on the bonds. The corporation gets adequate consideration for the shares by the discharge of its outstanding liability on the bonds. The transaction does not involve a payment away of capital as dividends or any illegal reduction of capital or other illegitimate dealing with assets. A fixed charge on profits is in effect the same thing as a fixed charge on capital. If the charge is paid off the assets in either case are increased. There is nothing in the nature of the issue of shares at a discount, and the case is not within the principle of *Trevor v. Whitworth*. (1)

Martelli, K.C., and *Whitmore Richards*, for the respondents. The transaction is ultra vires because if profits should be made hereafter the company would be able (contrary to the provisions of the Companies Acts) to pay dividends out of capital. The bonus would be capital. The fund out of which the principal and bonus are expressed to be payable has not yet come into existence, and there is no present debt due from the corporation to the bondholders. The charge on future profits is not for the company's benefit. No consideration moves to and no asset is acquired by the corporation, and the transaction involves the issue of 100,000 shares for no consideration. Upon the true construction of condition 13 of the bonds, the company, though thereby enabled to accelerate the time of payment of the principal moneys and bonus secured by the bonds, cannot alter the fund out of which they are payable and is not at liberty to change an income obligation into a capital obligation. Persons having business dealings with and giving credit to the corporation would be misled by the increase of capital without the corporation acquiring an increase of assets. [They referred to *In re Railway Time Tables Publishing Co.* (2) and *Mosely v. Koffyfontein Mines, Ltd.* (3)]

Romer, K.C., in reply.

The House took time for consideration.

(1) (1887) 12 App. Cas. 409.

(2) (1893) 62 L. J. (Ch.) 935.

(3) [1904] 2 Ch. 108.

June 14. LORD MACNAGHTEN. My Lords, the Famatina Development Corporation, Limited, was incorporated in January, 1903, under the Companies Acts, 1862—1900, as a company limited by shares with a capital of 400,000*l.*, divided into 400,000 shares of 1*l.* each, and with power to increase its capital by the issue of new shares.

H. L. (E.)
1910
FAMATINA
DEVELOP-
MENT
CORPORA-
TION,
LIMITED
v.
BURY.

The principal object of the company was to develop a copper mine in the Argentine Republic, from which large returns were expected and which is said to be a very valuable property.

In October, 1904, the company, being in want of money for the purposes of its undertaking, borrowed 50,000*l.* by the issue of a series of 5000 bonds of 10*l.* each.

The bonds of that series were issued on the terms that the company would, when and so far as there were net profits available for the purpose, pay to the registered holder for the time being the principal money of 10*l.* together with a sum of 25*l.* by way of bonus. It was declared on the face of each bond that the principal money and bonus thereby secured should be payable exclusively out of net profits, and would, so far as possible, be paid in equal instalments of 5*l.* per annum extending over seven years; but the registered holder for the time being of any ten bonds of the series was to have the option of converting the principal money thereof into a first mortgage debenture of the company for 100*l.*, without prejudice to his right to the bonus.

One of the conditions indorsed on each bond (condition 13) was to the effect that the company might at any time after December 31, 1906, give notice in writing to the registered holder of its intention to pay off the bond, and that upon the expiration of six calendar months from such notice being given the principal money, if not converted, and the bonus thereby secured, should become payable.

All the bonds of the 1904 series, with the exception of a small number which, for the purpose of the question now in debate, may be disregarded, were converted into first mortgage debentures.

The company, so far, has not made any profits. Nothing has been paid, or is as yet payable, in respect of the bonus secured by the bonds.

H. L. (E.)
 1910
 FAMATINA
 DEVELOP-
 MENT
 CORPORA-
 TION,
 LIMITED
 v.
 BURY.
 ———
 Lord
 Macnaghten.

In November, 1908, the company was desirous of increasing its capital. It was found that the existence of the charge of 125,000*l.* on future profits in respect of the bonus attached to the bonds of the 1904 series created a great difficulty in the way of raising further capital, and so, with the consent of all parties interested, it was arranged that 300,000 new shares of 1*l.* each should be issued, and that the bonus of 25*l.* in respect of each bond should be satisfied or extinguished by the allotment of twenty new shares of 1*l.* each, considered as fully paid, leaving the balance of the proposed new issue available to provide further capital.

It was suggested, however, that the proposed arrangement would be *ultra vires*. The present suit was brought to test the question, and a motion was made for an injunction before Parker J., who held that the scheme was not *ultra vires*, and made no order on the motion.

On appeal the Master of the Rolls and Farwell L.J. held that the proposed transaction would be *ultra vires*, and granted an injunction which, by consent, was made perpetual.

I am of opinion that the decision of the Court of Appeal is right.

Parker J. held that under condition 13 it was competent for the company to make the charge on future net profits a charge on capital and a present debt, and to issue shares fully paid in satisfaction of the debt so created. The Court of Appeal held, and I think rightly, that the charge was a charge exclusively on income, and that condition 13 merely provided that the company might, if it had funds in hand available for the purpose, pay off the charge in a lump, instead of discharging it by instalments.

If the construction which Parker J. placed on condition 13 were the true construction, I should still doubt whether the scheme could be carried out safely. Is it possible for directors to create a debt against their company and to saddle their company with it for the purpose of enabling them to issue shares without payment in cash, however advantageous they may consider the transaction to be? But as the question does not arise, I abstain from expressing any final opinion upon it.

It seems to me that the proposed transaction is *ultra vires*,

and that the directors, if they were to carry it out, would be guilty of a breach of trust which would involve personal liability on their part. They would be issuing shares without payment either in money or in money's worth. The charge is a charge on net profits only; that is, it is a charge on money which the company earns, but which, by the declaration of a general meeting on the recommendation of the directors, is, or would be but for the charge upon it, the property of the shareholders as individuals, and not the property of the company. The company as a corporation would be receiving nothing whatever in return for the extinction of the charge. Nor would the position of the company's creditors be improved in any respect.

H. L. (E.)

1910

FAMATINA
DEVELOP-
MENT
CORPORA-
TION,
LIMITED
v.
BURY.

Lord
Macnaghten.

If the directors were to make a return, as they are bound to do under the Act of 1908, they would have to state explicitly that the consideration for the issue of the shares was the release or relinquishment of a charge upon money which did not belong to the company as a corporation, but to the shareholders as individuals and the incumbrancers to whom it was hypothecated.

I am, therefore, of opinion that the judgment under appeal is right and must be affirmed.

LORD LOREBURN L.C. My Lords, I entirely agree with the judgment proposed by my noble and learned friend Lord Macnaghten and have nothing to add.

LORD ASHBOURNE and LORD COLLINS concurred.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, June 14, 1910.

Solicitors: *Allen, Edwards & Oldfield; Cox & Lafone.*

[HOUSE OF LORDS.]

H. L. (E.) VICKERS, SONS & MAXIM, LIMITED . . APPELLANTS;
1910
June 16. AND
EVANS RESPONDENT.

Employer and Workman—Compensation to a Minor—Review of Weekly Payments—Probable Earnings—Former Employment—Workmen’s Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (16.).

Upon a review of the weekly payments to a workman under the Workmen’s Compensation Act, 1906, who has been injured by an accident entitling him to compensation and who was then under age, if the review takes place more than twelve months after the accident “the amount of the weekly payments may be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding 1*l.*,” as enacted by the proviso to clause 16 of Sched. I.

The probable earnings there referred to are not restricted to what the workman would probably have been earning in his actual employment under the same employer, but are left to the discretion and good sense of the county court judge upon the evidence.

Decision of the Court of Appeal, [1910] 1 K. B. 554, affirmed.

THE respondent, aged twenty, was, while employed by the appellants as a labourer and earning 22*s.* a week, injured by an accident which entitled him to compensation. After he became twenty-one he applied for a review of the weekly payments on the ground that by reason of the accident he was prevented from earning 1*l.* 15*s.* a week, which he would otherwise have been able to do. The learned county court judge increased the compensation on the ground that but for the injury the respondent would probably have been earning 30*s.* a week as a stove grate fitter. This decision was affirmed by the Court of Appeal (Cozens-Hardy M.R. and Fletcher Moulton L.J., Buckley L.J. dissenting). Hence this appeal.

C. A. Russell, K.C., and H. J. Waddy, for the appellants, used the arguments which were rejected by the majority of the Court of Appeal, and are answered by the judgments of this House. They also referred to *Pomphrey v. Southwark Press*. (1)

E. M. Pollock, K.C., and G. A. Scott, for the respondent.

(1) [1901] 1 Q. B. 86.

LORD LOREBURN L.C. My Lords, this appeal may serve to remind us of a truth sometimes forgotten, that this House sitting judicially does not sit for the purpose of hearing appeals against Acts of Parliament, or of providing by judicial construction what ought to be in an Act, but simply of construing what the Act says. We are considering here not what the Act ought to have said, but what it does say; and I agree with the conclusion which has been arrived at by the Court of Appeal. The standard by which the weekly payments are to be measured in the Act is, generally speaking, the average weekly earnings during the period of the workman's actual employment under the same employer; but in the case of a minor, clause 16 of the First Schedule makes special provision for a review of the weekly payment. It says that the arbitrator may increase it "to any amount not exceeding 50 per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured." Now does that mean, as the appellants contend, what he would probably have been earning in his actual employment under the same master? Or may you consider other possible employment?

The appellants' contention involves reading words into this clause. The clause does not contain them; and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. The reasons urged by the appellants are, in the first place, that generally speaking the standard prescribed in the Act is the earnings in the workman's actual employ under the same employer. That is so; but no such express terms are to be found in the particular clause; and it seems to me that that argument tends rather against than in favour of the appellants.

The second reason put is that in the case of an adult, in reviewing the weekly payments, you could not have looked beyond the employment under the same employer except in the specified cases of difficulty provided for in clause 2 (a) of the schedule, and it is said there is no reason why a change should be made in this respect because of the workman being under age. Really this is an argument as to policy.

My Lords, I think, if we were to consider the merits of the

H. L. (E.)

1910

VICKERS,
SONS &
MAXIM,
LIMITED
v.
EVANS.

H. L. (E.) 1910
 VICKERS,
 SONS &
 MAXIM,
 LIMITED
 v.
 EVANS.
 Lord Loreburn
 L.C.

policy, there is great force in what is said upon this subject by Fletcher Moulton L.J.; but it is extraneous to enter upon that consideration. The arguments urged seem to me quite insufficient to lead us to read these words into the Act of Parliament. The question is what would the workman probably have been earning. Those are the only provisions in the Act; and I think the conclusion arrived at by the Court of Appeal is perfectly sound.

LORD MACNAGHTEN. My Lords, I agree. I do not see any reason for departing from or qualifying the plain words of the section, and I think the evidence on which the learned county court judge seems to have relied was properly admitted.

There are, no doubt, many employments, such, for instance, as employment in a colliery, in which, as Mr. Russell pointed out, boys follow the calling of their father, looking forward to a regular increase of earnings as they become more and more capable of doing a man's work. In such a case as that there is no difficulty in estimating the probable amount of earnings which the workman if uninjured would have been able to gain. On the other hand there are employments in which boys are engaged simply because they are boys and not men, and in which there is no prospect of advancement or employment when they grow up to man's estate. When they cease to be boys they are discharged to find their livelihood as best they can. In such a case the method which the statute has adopted seems to be the only method practicable.

Within a fixed limit the statute leaves the question quite at large, trusting to the discretion and good sense of the county court judge. No doubt the task committed to him is somewhat difficult, but the judge has been trusted, and I think properly trusted, to deal with each case reasonably without any fear of his making an extravagant or immoderate estimate of the workman's earning capacity.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD COLLINS. My Lords, I am of the same opinion.

There is no doubt that in the earlier Act the standard by

which the compensation was to be appraised was the standard of the workman's earnings in the employment of the same employer in whose employment he was at the date of the accident ; but, as was pointed out by the Master of the Rolls, in the case of a minor under the present Act there has been a radical difference made, and the standard has been altered in several respects. For instance 100 per cent. is substituted for 50 per cent. of his average weekly earnings, and we find also that the analogy of other employments under other masters is introduced, failing the possibility of his continuing to carry on his employment in the employment of the same master ; so that you have a radical alteration in the standard introduced in the case of a minor.

The problem put to be solved, or the salient point at all events to be solved, by the learned county court judge in the case of a minor, according to the 16th clause of the First Schedule, is that on such review "the amount of the weekly payment may be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured." So that the primary question the county court judge has to decide is what they would have amounted to under conditions that have not arisen ; in fact it is a matter of speculation as to what the workman would have been earning if he had remained uninjured. Now that, *prima facie*, would leave the learned county court judge at large to consider (having regard to the constitution and the antecedents of the workman) what in all probability he would have been earning if uninjured. That clearly would not, *prima facie*, have cut down the consideration to what he would have been earning in the same employment.

But then, furthermore, the particular clause here, clause 16, does not in terms refer to the standard of his actual employment at all. The words are not there ; and the proposition which is obviously the primary proposition to be dealt with by the learned county court judge who is considering it is what would have been his earning capacity—not what would have been his earning capacity in the particular employment in which he then was, but generally his earning capacity. That is the

H. L. (E.)

1910

VICKERS,
SONS &
MAXIM,
LIMITED

v.

EVANS.

Lord Collins.
—

H. L. (E.) prima facie meaning of the words used ; and they are not limited
1910 by any express provision that the standard is to be what he
VICKERS, would have been earning in the employment of the same
SONS & employer.
MAXIM,
LIMITED

v. That is enough, I think, to carry the case as the Court of
EVANS. Appeal have decided it ; but, even if the standard to be aimed
at by the learned county court judge was a guess at what the
workman would have been able to earn in the same employment,
even supposing that was the condition, I am not at all sure that
that has been violated in this case ; because where there is an
absence of evidence as to the actual employment in exactly the
same employment in the same district, the Act itself introduces
the element of another workman other than the man himself,
and what another workman is able to do in employment that is
not that of the same employer, but an analogous employment
in the same district. That has obviously introduced a standard
which is not necessarily the standard of the employment of the
same employer.

Lord Collins. Under those circumstances, what has the learned county court
judge to do in order to give himself a guide as to what this
youth might probably have done hereafter ? Surely he is not
bound to limit himself to speculations as to what he would have
done in the same employment under the same master. He must
guide himself in the first instance as to the probabilities of the
boy ever emerging from the condition of a mere labourer into
that of a skilled artisan. In this case evidence is tendered and
received that he was in fact able to overstep that barrier, that
he had become in fact more than a mere labourer ; he had
become a skilled workman in another and, the county court judge
might well consider, very analogous employment, employment
in engineering works involving mechanical work of the same class
though, probably, not technically in every detail the same as
that on which he was employed ; but he had acquired the position
of a skilled workman in mechanical occupation in the same
district. He had been engaged in stove-fitting, which was in the
same class of occupation as that in which he had been employed
at Vickers & Maxim's works. Therefore it seems to me that
the learned county court judge might (and it was for him)

perfectly well treat employment in which he had risen to the position of a skilled artisan as the same, for practical purposes, as testing his capacity to earn money in that sort of work ; he might perfectly well treat that as a very guiding fact in arriving at the decision as to whether this youth would have been able to earn the wages of a man and not those of a boy. But that is the head and front of the learned county court judge's offending in this matter. He has arrived at the conclusion that this boy should be looked upon as a person who, at the time at which he had to consider his capacity, had emerged from the position of a labourer into that of a skilled artisan, and was entitled therefore to have substituted the wages assessed by that standard.

My Lords, it seems to me for these reasons that the decision of the learned county court judge was perfectly right, and that the Court of Appeal was right in affirming it.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 16, 1910.

*Solicitors : Telfer, Leviansky & Co., for Clegg & Sons, Sheffield ;
H. G. Campion & Co., for Arthur Neal & Co., Sheffield.*

H. L. (E.)

1910

VICKERS,
SONS &
MAXIM,
LIMITED
v.

EVANS.

Lord Collins.

[HOUSE OF LORDS.]

H. L. (E.) OWNERS OF S.S. DRAUPNER APPELLANTS;
 1910
 June 21. AND
 OWNERS OF CARGO OF S.S. DRAUPNER . RESPONDENTS.
 — THE DRAUPNER.

Admiralty—Damage to Cargo—Bill of Lading—Charterparty—Negligence Clause.

The decision of the Court of Appeal ([1909] P. 219) that the ship-owners were liable for the damage to the cargo was reversed by this House without deciding any question of law, on the ground that the Court of Appeal drew a wrong inference from admitted facts.

Bailhache, K.C., and Maurice Hill, for the appellants.

Atkin, K.C., and Lewis Noad, for the respondents.

LORD LOREBURN L.C. My Lords, in this case there is no question of law in dispute at all. The only question is one of inference of fact. The materials to enable us to arrive at a conclusion are all on paper, and all the circumstances which are relevant are in fact agreed on both sides; so that the point is simply what conclusion or inference of fact are we to derive from acknowledged premisses. Did the respondents know that the charterparty in this case was in the particular form containing a negligence clause?

Now they knew that it had been by themselves contracted that the charterparty should be in that particular form; they knew also admittedly that a charterparty had been made. Is not that *prima facie* evidence that they knew that the charterparty was in that form? When the bills of lading were handed to them, referring to the charterparty, and nothing said to intimate that it was not the charterparty which they had contracted for, it seems to me a legitimate inference to say that they must have concluded that it was the charterparty for which they had contracted.

There is a point in regard to Mr. Read at Boston having possession of the charterparty; but I think nothing can be based upon that fact.

My Lords, *prima facie* evidence is evidence which raises a rebuttable presumption of fact; it stands until rebutted; it therefore cannot establish more than a probability, but a probability which may be displaced by evidence. In my opinion there is here a *prima facie* case or probability which has not been displaced by evidence and which accordingly must stand.

My Lords, this matter, which is only a short matter of fact, might quite easily have been settled at the trial by one or two questions to a witness; but I have observed that neither the appellants nor the respondents have evinced any desire that the question should be settled in that simple and primitive way, but have preferred that we should come to a conclusion for ourselves.

My Lords, I think that the appellants are right. In expressing that opinion I wish merely to safeguard myself against this being regarded as a case in which the House has differed on questions of fact from the Courts before which the case has previously been presented. I think your Lordships are always very chary in differing, with regard to questions of fact, from a finding in the Courts below, mainly because those Courts have a better opportunity than we can have here of observing the weight and importance to be attached to the evidence of the different witnesses. But this is a case in which no oral evidence is in question at all. It is simply a case in which we are asked from admitted facts to draw the proper inferences. I need hardly say that I have some misgivings when I find myself in difference with the Court of Appeal, but I do think that the fair and proper inference is that which I have advised your Lordships to adopt.

LORD MACNAGHTEN. My Lords, I agree.

LORD ATKINSON. My Lords, I agree.

LORD SHAW OF DUNFERMLINE. My Lords, I agree.

Order of the Court of Appeal reversed and judgment entered for the appellants with costs here and below.

Lords' Journals, June 21, 1910.

Solicitors: *Thomas Cooper & Co.; William A. Crump & Son.*

H. L. (E.)

1910

OWNERS
OF S.S.
DRAUPNER
v.
OWNERS
OF CARGO
OF S.S.
DRAUPNER.

Lord Loreburn
L.C.

[HOUSE OF LORDS.]

H. L. (E.) KENT COAL CONCESSIONS, LIMITED . . APPELLANTS ;
 1910
 June 21. DUGUID AND OTHERS RESPONDENTS.

Practice—Discovery of Documents—Further Affidavit of Documents—Relevancy of Documents—Discretion—Order XXXI., r. 12.

This House affirmed a decision of the majority of the Court of Appeal which affirmed the decision of Jelf J., who affirmed the decision of the Master that the plaintiff must make a further affidavit of documents—there being no principle of law in dispute and the whole question being one of discretion upon the facts.

Decision of the Court of Appeal, [1910] 1 K. B. 904, affirmed.

THE circumstances material to this appeal are stated in the judgment of the Lord Chancellor.

Sir E. Carson, K.C., and Bell Hart, for the appellants.

Simon, K.C., and Sims Williams, for the respondents.

LORD LOREBURN L.C. My Lords, the question here is whether this House should interfere with a discretion exercised by the Master, confirmed by the learned judge at chambers and confirmed by the Court of Appeal.

I do not think myself that in the present case there is any real question of principle involved, such as Vaughan Williams L.J. thought he perceived. The facts are that an action for libel is brought, and issues, whatever they may be, arise in the course of the action. One, at all events, of the issues was whether this company was in a sound condition or not. Thereupon the plaintiff makes an affidavit of documents, and he includes as relevant the report and the balance-sheet which is attached to and explained by the report; and the Court of Appeal, confirming the learned judge and the Master, think that the books, which are the foundation of the balance-sheets are also relevant. I think that is true. In any case it is the exercise

of a discretion. The learned judge decided that on the information before him there was ground for going behind the former affidavit.

My Lords, the law laid down in the case of *Jones v. Monte-Video Gas Co.* (1) has been referred to, but it is very familiar. It merely, as I understand it, reaffirms the practice and rule which have been acted upon constantly by Courts in matters of discovery. In regard to the exercise of the discretion here, so far as I can see, I agree with it; but I do wish to say this: This House is of course open for the reconsideration of an exercise of discretion, but it is a very exceptional case in which the House will entertain the revisal of a discretion exercised by the Court of Appeal confirming the opinion of the learned judge. Even if I were disposed not to agree with it, I see no question of principle here, and I should not be at all prepared to differ from the solution arrived at by the Court of Appeal.

H. L. (E.)
1910
KENT COAL
CONCESSIONS,
LIMITED
v.
DUGUID.
Lord Loreburn
L.C.

LORD MACNAGHTEN. My Lords, I agree.

LORD JAMES OF HEREFORD. My Lords, I entirely concur in every word which has been uttered by the noble and learned Lord on the woolsack.

I should be very jealous indeed to concur in any course which would support what in former days was called a "fishing" application—that a party should set himself to work, without any case of his own, to endeavour to discover some case from his opponent.

But when one comes to look at these reports and books upon which our judgment is asked, I cannot see any danger whatever, even if this application were a fishing application, that the plaintiff can sustain any injury. We are not here positively deciding whether these books must be admissible or not. All that is asked is that a further affidavit shall state what documents are in the possession of the plaintiff. When this affidavit is made, questions may arise which I do not think Sir Edward Carson quite answered, and I do not think Mr. Simon admitted.

(1) (1880) 5 Q. B. D. 556.

H. L. (E.) the difficulty would arise. But that will be determined in a way
1910 I am sure that will inflict no injustice upon the plaintiff, and
KENT COAL under those circumstances, my Lords, I entirely agree that our
CONCESSIONS, discretion cannot be called in to overrule the discretion of the
LIMITED Court.
v.
DUGUID.

LORD ATKINSON. My Lords, I concur, but entirely upon the ground that this is a matter of discretion, and that it has not been established to my satisfaction that the Master or the Court of Appeal have gone upon a wrong principle.

LORD SHAW OF DUNFERMLINE. My Lords, I agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 21, 1910.

Solicitors: *Charles Trevor & Co.; Lewis & Lewis.*

[HOUSE OF LORDS.]

JOHN STEWART APPELLANT; H. L. (Sc.)
AND 1910
DAVID R. WILLIAMSON RESPONDENT. April 29.

Arbitration—Lease—Outgoing Tenant—Sheep Stock Valuation—Agricultural Holdings (Scotland) Act, 1908 (8 Edw. 7, c. 64), s. 11, sub-s. 1.

By s. 11, sub-s. 1, of the Agricultural Holdings (Scotland) Act, 1908, “All questions which under this Act, or under the lease, are referred to arbitration, shall, whether the matter to which the arbitration relates arose before or after the passing of this Act, be determined, notwithstanding any agreement under the lease or otherwise providing for a different method of arbitration, by a single arbiter in accordance with the provisions set out in the Second Schedule to this Act.”

The appellant was tenant of a farm under a lease which contained the following clause:—The appellant binds himself at the expiry of his lease to “leave the sheep stock on the farm to the proprietors or incoming tenant according to the valuation of men mutually chosen with power to name an oversman” :—

Held (affirming the decision of the First Division of the Court of Session), that the valuation of the sheep stock was referred to “arbitration” in Scottish law and consequently fell within s. 11, sub-s. 1, of the Act of 1908, which section superseded the provisions of the lease.

APPEAL from an interlocutor of the First Division of the Court of Session, Scotland, in a test case. (1)

The appellant was John Stewart, tenant under the respondent of the farm of Fordie, near Crieff. The respondent was Colonel David R. Williamson, of Lawers, Comrie. The action was raised in the Sheriff Court at Perth, at the instance of the appellant against the respondent, to have the respondent ordained to appoint an arbiter, who should, along with an arbiter named by the appellant, determine the sum to be paid to the appellant by the respondent as the value of the sheep stock left by the appellant on the farm of Fordie. The lease under which the appellant held the farm was granted by the respondent and his trustees in

H. L. (SC.) 1884 and was renewed by the respondent till Whit Sunday, 1909.
1910 One of the conditions of the lease was that the appellant "shall
STEWART leave the sheep stock on the farm to the proprietors or incoming
c. tenant according to the valuation of men mutually chosen with
WILLIAM- power to name an oversman," and the lease continued, "but
SON. the proprietors or incoming tenant shall not be bound to take a
larger amount of stock than the tenant has been in the usual
practice of keeping on the farm." In view of his leaving the
farm at Whit Sunday, 1909, the appellant requested the
respondent to concur with him in choosing arbiters to
value the sheep stock in terms of the lease. The respondent
refused to do this and maintained that, in view of s. 11, sub-s. 1,
of the Agricultural Holdings (Scotland) Act, 1908 (8 Edw. 7, c. 64),
the value of the sheep stock fell to be fixed by a single arbiter
in accordance with the provisions set out in the Second Schedule
to that Act. Sect. 11, sub-s. 1, of the Act provides as follows:
"(1.) All questions which under this Act, or under the lease, are
referred to arbitration, shall, whether the matter to which the
arbitration relates arose before or after the passing of this Act,
be determined, notwithstanding any agreement under the lease
or otherwise providing for a different method of arbitration, by
a single arbiter in accordance with the provisions set out in the
Second Schedule to this Act."

The respondent replied (April 19, 1909) to the appellant's request, "It is only with Mr. Smith (the new tenant) with whom [*sic*] you have to deal in handing over the sheep stock of Fordie farm." This Mr. Smith when referred to would not accept the obligation of the lease, but would take the sheep stock at market value only. The appellant informed the respondent of this and requested him to name an arbiter to act in terms of the lease, but no reply was made. The appellant pleaded that, the respondent being bound by the terms of his bargain to concur as requested and having refused, decree ought to be granted as craved. The respondent admitted he had refused to concur in appointing arbiters, and explained that under s. 11 of the Act of 1908 all questions which under the lease are referred to arbitration shall, notwithstanding any agreement under the lease providing for a different method of

arbitration, be determined by a single arbiter; and that valuation of the sheep stock and the quantity of stock that should be taken over under the lease are questions referred to arbitration within the meaning of s. 11. He further averred that the parties were in dispute as to the basis of the valuation falling to be made, and he pleaded that the application was incompetent in respect that the provision in the lease as to arbitration had been superseded by the Act of 1908.

H. L. (Sc.)

1910

STEWART

v.

WILLIAM-
SON.

The sheriff-substitute (Sym) on May 24, 1909, pronounced an interlocutor finding that it was incumbent on the respondent that he should nominate a person of skill to value, along with a person nominated by the appellant, the sheep stock which the appellant had to leave on the farm at his outgoing.

On July 13, 1909 (1), the First Division [the Lord President (Lord Dunedin) and Lords Kinnear and Pearson] recalled the sheriff-substitute's interlocutor and dismissed the action with costs, holding that s. 11 of the Agricultural Holdings (Scotland) Act, 1908, applied and abrogated the provisions in the lease and made it necessary to appoint a single arbiter.

April 22, 26. *Alexander Ure, L.A.*, and *Macmillan* (both of the Scottish Bar), for the appellant. The section relied on by the respondent does not apply to this case, where it was merely the value of the thing which had to be decided. The word "arbitration" in the Act of 1908 referred to debateable points between parties: *Erskine*, 4, 3, 29; *Bell on Arbitration*, 2nd ed., p. 88; *Gilmour v. Caledonian Insurance Co.* (2) There is a well-defined distinction between valuations and arbitrations which has been repeatedly recognized in Scotland and England. An Act relating to arbitration does not apply to a case where there is no existing dispute between the parties. Here there was no dispute. What was to be decided was the value of the flock of sheep. A valuation is a mere informal reference to men of skill to determine the value of a particular subject-matter, while an arbitration is a proceeding of a formal and judicial character for the purpose of deciding questions at issue between the parties thereto. The method of ascertaining the value of the sheep

(1) (1909) S. C. 1254.

(2) [1893] A. C. 85.

H. L. (Sc.) 1910
 STEWART
 v.
 WILLIAM-
 SON.

stock prescribed by the lease presents a typical case of a valuation as contrasted with an arbitration. All that the lease contemplated was that according to the familiar and long-established practice in such matters each party should nominate a man of skill to inspect and put a price upon the stock, and that in the event of these men of skill differing as to the figure to be adopted they should call in a third man of skill to decide between them as to the true value. The code of procedure set forth in the Second Schedule to the Act of 1908 is inappropriate to such a valuation and makes provision for elaborate and expensive formalities, such as are not observed in practice in such cases. A method of valuation which the parties have themselves adopted in a contract between them cannot lightly be presumed to have been intended by the Legislature to be set aside, and nothing less than words of unequivocal application will be effectual to have that effect. It is not disputed that a valuation may become an arbitration, as the arbiters may not agree as to the amount of the value of the stock. An arbitration would then be necessary, but in this case the parties never went so far. The appellant was met with a distinct refusal to join in the appointment of arbiters on the ground that the Act of 1908 superseded the provision for arbitration in the lease. The contract in the lease to have the value of the sheep fixed is not an agreement to refer to arbitration, but to liquidate part of the contract between the parties. In the law of Scotland on references and arbitrations there are two distinct classes of cases—first, where there is a real dispute between the parties, and, secondly, where only a part of the contract has to be liquidated. In the latter case there is no question of arbitration at all: *Smith v. Duff* (1); *M'Gregor v. Stevenson* (2); *Morrison v. Aberdeen Market Co.* (3); *Calder v. Mackay*. (4) The distinction between valuation and arbitration was recognized in *Nivison v. Howat* (5), where Lord Young said “All the parties here desired or bargained for was the intelligent opinion of two skilled persons.” See also Lord M'Laren in *Ramsay v. Strain* (6) and Lord Rutherford

(1) (1843) 5 D. 749.

(2) (1847) 9 D. 1056.

(3) (1847) 9 D. 910.

(4) (1860) 22 D. 741.

(5) (1883) 11 R. 182, 191.

(6) (1884) 11 R. 527, 530.

Clark in *Robertson v. Boyd and Winans* (1), shewing that a reference such as this is not in any sense a submission to arbiters. *Logan v. Leadbetter* (2) decided that in such a case as this it is incompetent to lead evidence. See also *Davidson v. Logan*. (3) The same law as to the distinction between valuation and arbitration prevails in England: Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 12: *Collins v. Collins* (4); *Bos v. Helsham* (5); *In re Hopper* (6); *Thomson v. Anderson* (7); *In re Dawdy* (8); *In re Carus-Wilson and Greene*. (9)

H. L. (Sc.)

1910

STEWART

v.

WILLIAM-
SON.

J. A. Clyde, K.C., and *Mercer* (with them *Hon. William Watson*) (all of the Scottish Bar), for the respondents. On the first point it is easy to see that there was a dispute. The record shewed that there were disputes. For instance, the new tenant would not accept the valuation of the stock as a going concern; he wanted it at market value only. This shews a dispute as to the basis of valuation. Further, the appellant asks in his summons for an adjustment of reference by the Court, an application which involves a dispute between the parties. The question first to be debated between the two men mutually to be chosen would be what was the valuation of the sheep and was that value to be assessed on a break-up value, or on an acclimatization value and going concern? That very question is now in litigation in the Court of Chancery: *Gillespie v. Riddell*. (10) The reference to arbiters to value the sheep stock is not in the nature of a simple reference to a tradesman to measure a given piece of work. The respondent cannot admit that there is a distinction between valuations and arbitrations in the law of Scotland. They are all arbitrations. The contention that there was no dispute was absurd; but if there was even a "question," that was enough; the question here is "What is the value of the sheep?" If acclimatization value be taken into account, this would or might involve an inquiry by the arbiters both as to the history of the

(1) (1885) 12 R. 419, 426.

(5) (1866) L. R. 2 Ex. 72.

(2) (1887) 15 R. 115.

(6) (1867) L. R. 2 Q. B. 367, 376.

(3) (1908) S. C. 350.

(7) (1870) L. R. 9 Eq. 523, 530.

(4) (1858) 26 Beav. 306; 28 L. J.

(8) (1885) 15 Q. B. D. 426.

(Ch.) 184.

(9) (1886) 18 Q. B. D. 7.

(10) [1909] A. C. 130.

H. L. (Sc.) stock on the farm and the nature and state of the farm. The question of the basis of valuation is one of great moment and raises a question of law, which under the 1908 Act may be decided by the Court in a special case. In the Arbitration Act of Scotland, 1894, no distinction was taken between different classes of arbitration. It is the practice in Scotland to bring petitions for appointment of arbiters to value sheep stock under that Act, and the Court has treated such cases as arbitrations: *Gardiner v. Stewart's Trustees*. (1) There are distinctions between the laws of England and Scotland regarding arbitrations. In England the Court has power to determine whether a question referred to arbitration shall proceed before arbiters. This is not the case in Scotland. Two classes of arbitration are recognized in Scottish law—first, that which contains within its own borders a complete reference of the dispute, and, secondly, a submission which contains a reference of the price. The latter is an executorial and ancillary reference precedent to the carrying into effect of the contract. These submissions are materially different from one another, but both are arbitrations and come under the Act of Regulations of 1695, s. 25, which protects decrees arbitral from reduction except upon the grounds of corruption, bribery, or falsehood of the arbiters: Bell's Prin., 10th ed., s. 391; Bell on Arbitration, 2nd ed., p. 88; *Morrison v. Aberdeen Market Co.* (2) Lord Justice-Clerk Inglis in *Calder v. Mackay* (3) uses the word "arbitration" to cover a reference which the appellant contends is not an arbitration; Lord Deas in *Orrell v. Orrell* (4); and Lord Watson in *Gilmour v. Caledonian Insurance Co.* (5), where the learned judge treats all the cases as cases of "arbitration." Therefore the descriptions "arbitration" and "arbiters" are equally applicable in cases of arbitration of a dispute and in cases where the value only of a subject is referred: *Mackenzie v. Hill*. (6) The respondent maintains this is a dispute or "question," and, secondly, that it is an arbitration and comes within the Act of 1908. The words of the Act are "All questions which under the lease are referred to arbitration." All that has

(1) (1908) S. C. 985.

(2) 9 D. 910.

(3) 22 D. 741, 743.

(4) (1859) 21 D. 554, 558.

(5) [1893] A. C. 85.

(6) (1868) 40 S. Jur. 499.

to be decided to bring the case within the Act is that there shall be a "question" referred. H. L. (Sc.)

The words "award" and "decrees arbitral" (the old name for arbitration) are synonymous terms: *Earl of Hopetoun v. Scots Mines Co.* (1); *Earl of Selkirk v. Nasmith.* (2)

1910
STEWART
v.
WILLIAM-
SON.

[LORD MERSEY. Why is it that, when the clause in the lease mentions the word "oversman," it is turned from a valuation into an arbitration? (3)]

When two men were appointed to value the stock, with an oversman to give a final opinion, a tribunal was set up and the oversman was really made judge of the matter: *Morrison v. Aberdeen Market Co.* (4); *M'Nair's Trustees v. Roxburgh* (5); Professor Wood on Arbitrations, p. 76. Decisions and institutional writers recognize that references to determine the value fall within the category of arbitrations, although there is no lis. The respondent submits that the decision of the First Division was right and that this case does fall under s. 11 of the Act of 1908.

Macmillan in reply.

The House took time for consideration.

April 29. LORD LOREBURN L.C. My Lords, your Lordships are asked to decide whether a clause in a lease dated 1884 has been superseded by the provisions of the Agricultural Holdings (Scotland) Act, 1908. The clause runs as follows: John Stewart hereby binds and obliges himself "at the expiry of this lease to leave the sheep stock on the farm to the proprietors or incoming tenant according to the valuation of men mutually chosen with power to name an oversman."

Is this superseded by the words of s. 11? [His Lordship read the material part of the section.] If this were an English

(1) (1856) 18 D. 739.

(2) (1778) Mor. Dict. 627.

(3) The Lord President (Lord Dunedin) said in the Court below, "Men mutually chosen with power to name an oversman" is the expression actually employed; and the

use of the word 'oversman' is quite sufficient to shew that an arbitration was intended": (1909) S. C. 1254, 1257.

(4) 9 D. 910.

(5) (1855) 17 D. 445.

H. L. (Sc.) case the authorities decided on the Common Law Procedure
 1910 Act, 1854, draw a marked distinction between arbitration and
 STEWART valuation. It is one thing to refer a dispute to the decision of
 v. an arbitrator who has to hear parties and witnesses as in a Court
 WILLIAM- of law. It is another thing to say that a third person shall
 SON. value the subject of sale, as when an incoming tenant agrees to
 Lord Loreburn buy fixtures at a valuation. But we are not concerned with
 L.C. English law or English usages.

What we really have to decide is whether the word "arbitration" in s. 11 of the Act covers such a reference as that in the present lease according to the Scottish legal terminology. In a point of this kind your Lordships will be disposed to pay a very especial attention to the opinion of the learned judges in Scotland, whose experience has brought them into such close familiarity with such questions. I own that to my mind, unconsciously influenced it may be by the English authorities, the clause does not look like arbitration. But I deliberately defer to the First Division unless clear authority can be cited to shew that it is erroneous.

I do not find such clear authorities. There are cases in which the difference is pointed out between appraisement and a strictly arbitral proceeding. But in many passages the word arbitration is used to cover all kinds of reference. And when every allowance is made for the inevitable laxity with which convenient general words are applied without prejudice to closer distinctions which do not need to be regarded in the particular case, I am unable to say that upon the authorities the word arbitration is inapplicable to a clause of this kind.

Accordingly I move your Lordships to dismiss this appeal.

EARL OF HALSBURY. My Lords, I am entirely of the same opinion, and I am bound to say I think I go perhaps a little further than the Lord Chancellor, because I believe that the word "arbitration" has an ordinary meaning in the English language which prevails both in Scotland and in England. I think it means something which is submitted to the arbitrament—to the adjudication of private persons—agreed upon by the parties, as distinguished from the ordinary Courts of law; and

it appears to me that the meaning and object of the statute of 1908 was to sweep away that which must have been well known to those who framed the Act, namely, that in the ordinary course of things in Scotland this particular question of taking over the stock and valuing it was a subject which the parties have agreed upon, and that in making their leases it is the ordinary and customary mode between the person who is taking the stock and the person who is to pay for the stock when he takes.

H. L. (Sc.)

1910

STEWART

v.
WILLIAM-
SON.Earl of
Halsbury.

Looking at the language of these leases generally, it is agreed that there are to be persons mutually chosen. I notice that the word "skilled" is introduced more than once in some of the judgments. I think that is a little inaccurate. There is no such word in this lease, nor is there any such word in the statute. The question here is simply whether or not the clause in this lease comes within the words of the statute. Now, whatever may be said about the policy of it, or whether or not it would have been better to allow that which people in Scotland have found to be convenient, namely, that two neighbours or friends should adjudicate upon the matter, we have nothing to do with that. Our duty is to construe the language in its ordinary and natural meaning, to give effect to what the Legislature intended. We have nothing to do with the question whether or not it was a desirable Act to pass. The question here is, what is the meaning of it? To my mind it is beyond all doubt that what the Legislature intended was to sweep away all these private arbitraments which the parties have themselves agreed upon, and to determine that there should be one uniform form of procedure. Once we have arrived at that, as being the intention of the Legislature, we have nothing more to do than to give effect to it. I am, therefore, entirely of the same opinion as the Lord Chancellor has expressed, and I agree in the motion which he has made.

LORD ATKINSON. My Lords, I concur. It appears to me that in face of the numerous Scottish authorities which have been cited, it is impossible to hold that, according to the procedure and nomenclature adopted in judicial proceedings in Scotland,

H. L. (SC.) this is not an arbitration. That being so, I concur in the
1910 decision of my noble and learned friend on the woolsack.

STEWART

v.

WILLIAM-
SON.

LORD MERSEY. My Lords, I concur.

*Ordered that the interlocutor appealed from be
affirmed and the appeal be dismissed with costs.*

Lords' Journals, April 29, 1910.

Agents for appellant: *Roche, Son & Neale, for Connell &
Campbell, S.S.C., Edinburgh.*

Agents for respondent: *Stileman & Neate, for Hamilton,
Kinnear & Beatson, W.S., Edinburgh.*

[PRIVY COUNCIL.]

J. C.*

ARTHUR GILBERT HORDERN AND ANOTHER. PLAINTIFFS;

1910

AND

April 28, 29;
June 7.

SAMUEL HORDERN AND ANOTHER DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH
WALES.

Law of Partnership—Provision for Purchase by Survivor of Share of Deceased Partner—Surviving Partner Sole Executor of Deceased—Valuation an Incident in the Purchase—Error in Valuation to be strictly proved after long Delay—Validity of Purchase.

By a clause in articles of partnership executed in 1878 between two brothers it was provided that on the death of either the survivor should pay to the executors of the deceased the full share to which they should be entitled on the taking of a general account in writing of the partnership assets, "such stock and other assets as shall not consist of money to be valued either by mutual agreement or valuation in the usual way nothing being charged for goodwill."

One brother died in 1886, and the survivor as sole executor under his will effected the valuation as directed, paid for the share as surviving partner, and thenceforth carried on the business on his own account.

In an action brought in 1908 by the residuary legatees under the said will against the surviving partner in effect for an account on the footing that there had been no operative sale and purchase in 1886 by reason of the valuation then made not being in manner authorized by the clause, and that the business must be deemed to have been carried on for the benefit of both parties to the suit:—

Held, that on the true construction of the clause there was a binding contract of sale and purchase, and that the valuation was only an incident in carrying out the same. The evidence shewed that a substantially accurate method had been adopted, but even if error had been shewn either in the method or the results it could not destroy the contract, but would fall to be corrected by the Court on being clearly and conclusively proved. The price of goodwill must in any event be excluded from the valuation, and the appellants could not rely exclusively on the dual character of the defendant which had been imposed upon him by their own testator.

Vyse v. Foster, (1874) L. R. 7 H. L. 318, and *Dinham v. Bradford*, (1869) L. R. 5 Ch. 519, approved.

APPEAL from a decretal order of the Chief Judge in Equity of the Supreme Court (May 17, 1909).

* *Present*: LORD MACNAGHTEN, LORD COLLINS, LORD SHAW OF DUNFERMLINE, and SIR ARTHUR WILSON.

J. C.
1910
HORDERN
v.
HORDERN.

The appellants sued on October 20, 1908, as residuary legatees under the will and codicil of one Anthony Horder, who died on September 17, 1886. The defendant Samuel Horder (since deceased) was the brother and sole executor and trustee of the said will and codicil, and prior to the death of Anthony Horder in 1886 carried on the business of drapers in co-partnership with him at Sydney, in the Colony (now State) of New South Wales, under articles of partnership dated September 12, 1878 ; clause 17 of which provided for the death of either partner and is sufficiently set out in their Lordships' judgment.

The appellants, by their statement of claim in 1908, alleged that Samuel Horder never took any steps to wind up the partnership, but carried on the same after the testator's decease under the firm name of Anthony Horder & Sons, with its capital and assets, without any final settlement of account between him or the firm and the testator's estate, and claimed that it might be declared that the partnership was dissolved by the death of the said Anthony Horder, and that the defendant thereafter carried on the business in breach of his duties as surviving partner and as executor and trustee of the will and codicil of Anthony Horder, with consequential relief.

The defendant alleged that, in accordance with the provisions of the articles of partnership between himself and Anthony, upon the death of the latter a general account was taken of the assets and effects belonging to the partnership, and of all debts due and owing by the partnership, including all principal and interest due to the partnership, and that he paid in accordance with the provisions of the said articles to the executor his full share to which he appeared to be entitled according to the balance-sheet taken on October 4, 1886, and that thereupon the whole of the assets of the partnership vested in him, the defendant, absolutely.

The question raised by the suit was whether under the circumstances of valuation and transfer which are set out in their Lordships' judgment the defendant did in 1886 validly acquire under the said clause 17 the testator's share in the partnership assets.

The judgment of the Chief Judge in Equity found that the

account had been taken in the same way as the half-yearly balance-sheets had for several years been taken while both parties were alive, the valuation being checked on behalf of the testator's estate. "The result of the stocktaking was that the sum of 158,232*l.* 15*s.* 10*d.* was found to be the value of the testator's share in the business excluding the goodwill, and this sum has been paid to the estate in eight half-yearly instalments with interest at 6 per cent." He added, "I think the evidence given on behalf of the defendant *prima facie* shews the correctness of the accounts taken on the 4th October, 1886."

J. C.
1910
HORDERN
v.
HORDERN.

The Chief Judge accordingly by his decretal order of May 17, 1909, directed the Master in Equity to make an inquiry whether or not the said sum of 158,232*l.* 15*s.* 10*d.* found on the taking of the account of October 4, 1886, in the pleadings mentioned to be the value of the share of Anthony Hordern in the partnership assets in the pleadings mentioned was the full value of the said share, and, if not, what was the full value exclusive of the goodwill, and that in making such inquiry the Master in Equity should take as the basis of value of the goods the cost thereof as landed in the stores of the said partnership and should take the balance-sheet of October 4, 1886, and the stock sheets bearing the same date as *prima facie* correct.

Buckmaster, K.C., Sheldon, and Sheppard, for the appellants, contended that the sale to and purchase by the defendant of the testator's share in the firm had not been made in accordance with the terms of clause 17 of the articles and was therefore bad and of no effect and ought to be set aside. The defendant as surviving partner purported under that clause to buy from himself as his brother's sole executor the testator's share in the business. He was accordingly bound to comply strictly with the terms and provisions of the said articles. On the contrary, the valuation made was neither by mutual agreement nor in the usual way. The evidence shewed that no one was appointed to value the stock and other assets on behalf of the testator's estate; and that instead of a proper valuation the defendant had the stock taken in the manner in which for the purpose of half-yearly balance-sheets as between

J. C.
 1910
 HORDERN
 v.
 HORDERN.
 —

the partners and with a view to ascertain the amount of divisible profits it had been taken during the last eighteen months prior to the testator's death without any attempt by measurements or otherwise to arrive at a strict valuation. It was contended also that many properties had been omitted therefrom. In the absence of any independent valuer on behalf of the testator's estate it was contended that valuation in the usual way did not mean an ordinary stocktaking for the purpose of ascertaining divisible profits, but a strict valuation as between an outgoing and an incoming partner, and such valuation was not made. Clause 17 was therefore not complied with in such a way as to authorize a valid sale having regard to the defendant's dual capacity of sole executor and surviving partner. There was therefore no sale at all, and accounts ought to have been decreed on the footing of the partnership continuing as a going concern for the benefit of the appellants as well as the defendant. At least the appellants were entitled to a share in the profits proportioned to the sum which the defendant ought to have paid in excess of what he actually paid and which he retained in the business as belonging to the testator's estate. Reference was made to *Wedderburn v. Wedderburn* (1); *Vyse v. Foster* (2); *Vickers v. Vickers* (3); *Dinham v. Bradford*. (4)

Sir R. Finlay, K.C., G. Cave, K.C., W. M. Cann, and G. E. Rich, for the respondents, were not heard.

1910
 June 7.
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The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. The appellants are the residuary legatees under the will and codicil of Mr. Anthony Hordern, who died on September 17, 1886. The executor appointed by Anthony was his brother, Mr. Samuel Hordern. The two brothers had carried on a large and apparently very successful business as drapers at Sydney, under articles of partnership dated September 12, 1878. The business was conducted under the firm name "Anthony Hordern & Sons," and the term of partnership was for thirty years from June 30, 1878.

(1) (1836) 2 Keen, 722, 726; (1838) (2) L. R. 7 H. L. 318, 338.
 4 My. & Cr. 41.

(3) (1867) L. R. 4 Eq. 529, 534.

(4) L. R. 5 Ch. 519.

No question arises in this case on the construction of these articles, except clause 17 thereof, which provides for the case of the death of either partner. The words relevant to the issue in this case are these : " Then within thirty days next after notice of such death shall have been received by the surviving partner a general account in writing shall be made and taken of the partnership goods, wares, stocks, credits and effects, belonging, due or owing to the said co-partnership ; also all debts due or owing by the said partnership, including all principal and interest due to the said partners ; and in taking such account such stock and other assets as shall not consist of money shall be valued either by mutual agreement or valuation in the usual way, nothing being charged for goodwill ; and the surviving partner shall and will pay or cause to be paid unto the executors or administrators of the so deceased partner his full share " in the proportions and by the instalments set forth in the articles.

Immediately upon the death of Mr. Anthony Hordern, the respondent Samuel, his brother, appears to have addressed himself to the duties devolving upon him as executor, and, as a large item in the estate of his deceased brother was his share in the assets and stock of the going business of Anthony Hordern & Sons, to have taken expeditious steps to have these assets valued, so as to enable him to perform his double duty, first as executor of his brother, and secondly as carrying out the provisions of the articles of partnership. In the words of the carefully considered judgment of the Chief Judge in Equity in this case, he " took an account of the assets in the business in the same way as the half-yearly balance-sheets had for several years been taken while both parties were alive, the only difference being that the defendant Samuel Hordern, after consulting with a Mr. Cornwell—an intimate friend of the testator in whom the testator placed implicit confidence—on Mr. Cornwell's nomination, appointed Mr. Thomas Alcock, a gentleman of wide business experience and of the highest character, to check the valuation on behalf of the testator's estate. The result of the stocktaking was that the sum of 158,232*l.* 15*s.* 10*d.* was found to be the value of the testator's share in the business, excluding the

J. C.

1910

HORDERN

v.

HORDERN.

J. C. goodwill, and this sum has been paid to the estate in eight half-yearly instalments, with interest at 6 per cent."

HORDERN
v.
HORDERN.

It should be added to this statement that Mr. Alcock was engaged, mostly in connection with the valuation of the very heavy stock of soft goods in the establishment, for about a week or ten days, and that, in connection with the hardware department, Mr. Ross, who still survives, was called in and took values, he being engaged for a day and a half at the task.

Although twenty-three years have elapsed since the transaction took place, and Mr. Alcock himself and no doubt many of the employees have since died, Mr. Samuel Hordern, the executor, Mr. Ross, the valuer, and one or two of the heads of departments in the establishment still survived at the date of the trial of the action; and they gave what was manifestly the best account they could give after the lapse of so many years of what actually took place. To counterbalance the lack of material caused by death and the lapse of time, there are several circumstances in connection with the business which simplify the matter. The business was large and its profits were great, mounting, as was shewn, in some cases to as much as 9000*l.* per month; but it was a ready-money business, and presented none of the familiar difficulties as to the assortment and valuation of debts. Further, it was a business in which, by the system of regular sales, the stocks were substantially cleared, so that the practical trouble as to deterioration in quality or from fashion was absent and the valuation thus simplified. Lastly, the balance-sheets, books, invoices, and price lists were all available and in order, so that by far the most trustworthy basis for the valuation of a stock to be quickly turned over was ready to hand.

It should be further noted that no reflection upon the conduct of Mr. Samuel Hordern appeared throughout the proceedings, and Mr. Buckmaster, in his careful argument for the appellants, stated with perfect candour and propriety that no suggestion whatever of this kind formed part of the appellants' case. It was further admitted that Mr. Ross and the late Mr. Alcock were suitable and proper men in point of experience to be employed for the task of valuation, and that, like Mr. Samuel Hordern himself, they had acted to the best of their ability and

with complete integrity. Finally, no suggestion was made that the heads of departments and other employees who had been trusted by the Messrs. Hordern were not competent to assist and be consulted by valuers who were going through the stock.

It appears to their Lordships that, when the facts above briefly narrated are kept in view, the so-called question of law which arises in this case is not one which it is seriously difficult to answer. The contention is twofold—first, that the valuation was no valuation because it was imperfectly conducted; and, secondly, that, looking to the twofold capacity in which Mr. Samuel Hordern, the surviving partner, stood, there was such a conflict of duty and interest on his part that nothing less would have sufficed than an exhaustive valuation conducted by arbiters appointed, one on behalf of the executory estate, whose interest was to have the stock priced at a high figure, and the other on behalf of Mr. Samuel Hordern, whose interest was, or—for that is not suggested—might conceivably have been thought to be, to get the stock priced at a small figure. These are the arguments.

1. As to the valuation being imperfect, their Lordships are clearly of opinion that all the exceptions taken to it fail. The phrase in clause 17 of the articles of partnership may, no doubt, be difficult to construe—the phrase, namely, that the valuation is to be “in the usual way,” and their Lordships obtained no assistance upon that subject from the appellants, who judiciously declined to interpret the phrase. What the valuers appear to have done was not, however, the cursory thing suggested in argument; it is certainly not substantiated that the valuers merely took things for granted. One witness, for instance, Mr. Green, speaking after the long interval of years, remembers that in the coloured dress department, of which he was head, Mr. Alcock, accompanied by Mr. May, made inquiries of himself, and, being asked, “You said the stock was shewn to Mr. Alcock, which he asked to see?” answered, “Yes; he turned it over and looked at the length and the quality; I told him the price.” Many other instances of the same kind occur, shewing that, while the heads of departments and others, all of whom are admitted to have been perfectly honest and capable, were

J. C.

1910

HORDERN

v.

HORDERN.

J. C.
1910
HORDERN
v.
HORDERN.
—

consulted, the valuation was made on the spot with all the advantages of the prices in the books, &c., and with information supplied from time to time as to selected or sample goods in the various branches of the establishment. One witness in the silk department is cross-examined on behalf of the plaintiffs and appellants, and he gives support to the view presented by counsel as to the elaboration of a valuation such as that which is argued for. He says that on the stock in the silk department he would have taken four months to accomplish the task of valuing. This may no doubt be true; but, if so, it is very plain that such a valuation, which applied to all the departments, would occupy many months and possibly some years, and accordingly is not the valuation which was prescribed by the articles of partnership, because, as already pointed out, the valuation "in the usual way" was to be made within thirty days of the death of the predeceasing partner. On the whole, their Lordships are perfectly satisfied that the mode adopted by Mr. Samuel Horder was the sensible mode, and that, for aught yet seen, the results were proper and were just to both parties.

2. The account just given seems to shew a fortiori that the argument as to a formal arbitration, with its elaboration and possible delay, is not well founded, and cannot have been the thing which was in the view of the parties to, or the meaning of their language in, the articles of partnership.

If these two points fail, then the real contention of the appellants, and that which gives a meaning to this litigation, is seen to be unfounded. That contention was to the following effect:—A wrong system of valuation was adopted, and there was therefore no valuation at all. Accordingly, clause 17 of the articles of partnership has not been complied with; and the surviving partner has not bought, as he alone could have bought. The extraordinary conclusion is then come to that clause 17 of the contract of partnership entirely disappears; that the surviving partner is therefore in the position of not having bought, or even being entitled to buy, the predeceasing partner's share of stock—although, as above explained, the respondent has already paid, after valuation, for

his deceased brother's share ; that the business accordingly has for all these years been conducted as a going concern for the benefit of both parties to the litigation ; and that as a consequence—and this is the kernel of the matter—the provision of clause 17 of the articles that the stock and assets were to be taken over exclusive of the goodwill of the business is an inoperative provision and must be read out of the contract, and therefore goodwill must be paid for now. The writ in this action is framed on this theory ; and their Lordships regret to observe that it is accompanied by the statement that Mr. Samuel Hordern has from September 17, 1886, carried on and is still carrying on the said business in breach of his duties as surviving partner and as executor and trustee. In their Lordships' opinion there is no real foundation for any such pleadings. The valuation of the stock was only an incident in the arrangements for carrying out the contract of purchase. That purchase the articles of partnership had prescribed should take place on the occasion of a partner's death, not as a matter of option, but as a matter of definite and binding agreement. If error crept into the method or results of the valuation, that error would fall to be corrected by a Court of law, so as to enable the agreed on purchase to be complied with. But the view is wholly false that such an error destroyed the contract of purchase. In *Vyse v. Foster* (1) Lord Cairns observed : " It appears to me beyond all doubt that these partnership articles constitute a contract in the clearest and most distinct sense of the term, a contract between persons who were entirely sui juris, and who were able to decide among themselves what should be their rights and in what relations they or their representatives should stand towards each other after their death. And I read the contract, as I have already said, as being a clear and absolute contract for purchase ; not an optional, but a complete contract, binding all parties, for the purchase of the interest of the testator on the 1st of July by those partners of his who might survive him in the concern. It is true that the terms of that contract provided for payment at certain intervals. The contract might have been made conditional upon those payments being made at

J. C.

1910

HORDERN

v.

HORDERN.

(1) L. R. 7 H. L. at p. 334.

J. C.
1910
HORDERN
v.
HORDERN.
—

those particular times ; it might have been said that the surviving partners should have a right to become proprietors of the whole of the trade, provided they gave a bond, provided they gave promissory notes, provided the payments in respect of the capital of the testator were made at the particular times indicated. But the contract does not run in that way, but it is an absolute contract of purchase, containing stipulations of the ordinary kind for the payment of the price. My Lords, I cannot read those stipulations as to time as being of the essence of the contract, and therefore I cannot admit that the argument of non-payment ad diem of these sums would of itself put an end to the contract."

In their Lordships' opinion the same principle applies to the case of non-compliance with certain particulars as to valuation of the assets to be purchased.

The distinction between a case where a transaction fails because an operation in the nature of a valuation upon which the conclusion of the transaction depended fails and a case like the present, in which the transaction of sale and transfer of the business is already concluded by the contract and the detail of a particular method of fixing the price may have to be in some respect altered, is brought out in the judgment of Lord Hatherley in *Dinham v. Bradford*. (1) In that case two partners made an agreement containing a provision that on the determination of the partnership one partner should purchase the share of the other at a valuation to be made by two persons, one appointed by each partner ; no umpire was provided, and difficulties accordingly arose. It was held, however, that the Court should carry the partnership agreement into effect by ascertaining the value of the share ; and Lord Hatherley observed, "If the valuation cannot be made modo et forma, the Court will substitute itself for the arbitrators." On the principle of that judgment, with which their Lordships are in agreement, the attempt which has been made by the appellants to get rid of the stipulation in article 17, under which the stock was to be valued exclusive of goodwill and become, on payment of the deceased partner's share, the property of the surviving partner, cannot succeed.

(1) L. R. 5 Ch. at p. 523.

Such an attempt if successful would upset the partnership deed in a vital particular, and is not justifiable in law.

It is no doubt true that the conflict between duty and interest may arise, but it is also true that that conflict is brought about entirely by the action of the late Mr. Anthony Hordern, who appointed Mr. Samuel Hordern his executor in the full knowledge that he would have to exercise on survivance the rights, and come under the obligations, stipulated in regard to the surviving partner by the articles of association. The idea that, in consequence of that possible conflict, Mr. Samuel Hordern's duty was to decline the trust reposed in him by his brother is out of the question. With regard to what actually occurred in this case, their Lordships are clearly of opinion that Mr. Samuel Hordern did what was manifestly in the interest alike of the executory and of the partnership by adopting the course which he pursued. With regard to the legal situation of parties placed in such a position and the position of the Court in regard thereto, it is not necessary to add anything to the few sentences of Lord Cairns in *Vyse v. Foster* (1): "I apprehend it to have been perfectly clear that the testator could not by appointing one of his partners as his executor annul that partnership contract which he had deliberately entered into. I cannot admit that it was necessary for the person so appointed executor to disclaim the executorship in order to save his contract. In the view at least of a Court of Equity, I apprehend that the contract remained in full vigour even although there might, from the peculiar position of the executor as a surviving partner, be reasons for watching narrowly the course which he would take with regard to the fulfilment of the contract."

It will be seen from the view expressed as to the substantial accuracy of the method of valuation adopted in the present case that, had the judgment of the Court below merely dismissed the suit, much could have been said in justification of that course. The judgment, however, may be taken as having opened the door for the rectification of possible errors in the results arrived at. Their Lordships, however, think it right to put on record (1.) that it was admitted by both of the appellants'

(1) L. R. 7 H. L. at p. 332.

J. C.

1910

HORDERN

v.
HORDERN.

J. C.
1910
HORDERN
v.
HORDERN.
—

counsel that the true object of the appeal was to secure the upsetting of clause 17 and the inclusion in, instead of the agreed on exclusion from, the valuation of a price for goodwill. Since this object is now definitely defeated by the judgment now pronounced, it may be hoped that the litigation may not be further pursued. But (2.) if further procedure in regard to the valuation does take place, their Lordships approve of the principles in regard thereto laid down in the judgment under appeal. The valuation already made will stand in all its unassailed particulars, and where its particulars are assailed the proof of error therein must be of a clear and conclusive character.

* Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Burton, Yeates & Hart.*
Solicitors for respondents: *White & Leonard.*



J. C.*

[PRIVY COUNCIL.]

1910
April 29 ;
May 3 ;
June 7 .
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JAMES LESLIE WILLIAMS DEFENDANT ;
AND
JOHN MACHARG PLAINTIFF.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA
(NEW SOUTH WALES REGISTRY).

Law of New South Wales—Civil Service Act, 1884, ss. 2, 48—Public Service Superannuation Act, 1899—Superannuation Allowance—Construction—Officer.

Held, that according to the true construction of the New South Wales Civil Service Act, 1884, the respondent, who had held office from September 24, 1868, to December 31, 1869, as temporary draftsman, was during that period an officer in the Civil Service. He held during that period a permanent salaried office, and was therefore within the term

* *Present*: LORD MACNAGHTEN, LORD COLLINS, LORD SHAW OF DUNFERMLINE, and SIR ARTHUR WILSON.

“officer” as defined in s. 2, and not within its exception as a “person employed temporarily.”

Held, further, that under s. 48 read in connection with the Public Service Superannuation Act, 1899, he was entitled to reckon the above period as additional service for the purpose of computing his superannuation allowance.

J. C.

1910

WILLIAMS

v.

MACHARG.

APPEAL by special leave from an order of the High Court (September 3, 1908) affirming an order of the Supreme Court of New South Wales (October 25, 1907) which had dismissed an appeal from a verdict and judgment of the District Court of the Metropolitan District at Sydney (July 30, 1907) in favour of the respondent.

The question decided in the appeal was as to the manner in which the superannuation allowance of the respondent, a retired officer of the Government of New South Wales, ought under the circumstances stated in their Lordships' judgment to be calculated, regard being had to the nature and length of the respondent's service and to the statutory provisions of the Civil Service Act, 1884, and the Public Service Acts of New South Wales.

On January 1, 1885, the Civil Service Act, 1884 (48 Vict., No. 24), came into force.

By s. 2 it was provided that in the construction of the Act the term “officer” shall mean “any person holding office in the Civil Service other than those mentioned in sections 7 and 8 and teachers under the Educational Division and persons employed temporarily”; and that the terms “Civil Service” or “Service” shall mean “the body of persons now or hereafter appointed to permanent salaried offices in the service of the Government” with certain immaterial exceptions. Sects. 7 and 8 did not include any person whose position was the same as or similar to that held by the respondent.

The Act also contains provisions (ss. 42 et seq.) under which an officer is to be entitled to a superannuation allowance upon retirement after having attained the age of sixty years (s. 43) or upon retirement for ill-health under that age (s. 44) or upon retirement owing to the abolition of his office (s. 46). Sect. 48 relates to the scale of superannuation allowances and is set out in their Lordships' judgment.

J. C.
1910
WILLIAMS
v.
MACHARG.

On December 23, 1895, the Public Service Act, 1895 (59 Vict., No. 25), came into force, and by s. 8 the Public Service Board appointed under the Act were empowered under certain circumstances therein mentioned compulsorily to retire any person employed in any department of the public service.

By s. 60 it was provided as follows: "If the services of any person permanently employed in the public service shall be dispensed with by the Board under the provisions of this Act otherwise than for an offence then (1.) if such person shall have been employed in the public service before and at the date of the commencement of this Act and shall be a contributor to the superannuation account under the provisions of the Civil Service Act of 1884 but shall not be entitled to retire under sections 43 and 44 of that Act, such person shall receive a refund of the amount of his contributions to such account, calculated to the date on which his services shall have been dispensed with, together with a gratuity not exceeding one month's pay for each year of service from the date of his permanent appointment and a fortnight's pay in respect of each year of temporary service, such gratuity to be calculated on the average of his salary during the whole term of his employment, and to be payable only in respect to service prior to the commencement of the Act."

On September 30, 1896, the respondent was under the provisions of s. 8 compulsorily retired otherwise than for an offence, the reason of his retirement being that the Church and School Lands Office was then abolished as a separate branch of the Department of Public Instruction; and thereupon he was paid by the Government of New South Wales a lump sum calculated in accordance with the provisions of s. 60 (1.) of the Public Service Act of 1895.

Under s. 2 of the Public Service (Superannuation) Act, 1899 (63 Vict., No. 55), which came into force on December 29, 1899, an officer employed in the public service, who was a contributor to the Civil Service Superannuation Account and whose services were dispensed with within twelve months of the commencement of the Public Service Act, 1895, provided he had served for fifteen years or more, became entitled to receive a superannuation allowance calculated in accordance with ss. 43 and 48 of the

Civil Service Act, 1884, subject to deduction as therein described.

J. C.

1910

WILLIAMS

v.

MACHARG.

The Government held that the fifteen years' service referred to in the Acts of 1884 and 1899 must have been continuous service and that the respondent was not entitled to the benefits of the Acts. But after the decision in *Walker v. Simpson* (1), whereby it was decided that service for the purposes of s. 48 of the Civil Service Act, 1884, need not have been continuous, the respondent claimed from the Government a superannuation allowance calculated upon a total service of seventeen years two months and two days. The Government granted the respondent a superannuation allowance calculated on a basis of fifteen years' service, excluding the period from September 24, 1868, to December 31, 1869, and the fractional parts of the year included in the fifteen years ten months and twenty days to which the respondent's claim was reduced by their decision. The superannuation allowance so granted was 28*l.* 6*s.* per annum.

The respondent thereupon sued the appellant as representing the Government of New South Wales to recover 104*l.* 15*s.*, being arrears of his superannuation allowance calculated for the whole period of seventeen years two months and two days. The District Court judge decided that the respondent was throughout the whole period an officer within the meaning of the Civil Service Act, 1884, and that a broken part of a year ought to be taken into account in calculating a superannuation allowance under s. 48 of the Act. He accordingly held that the respondent was entitled to a superannuation allowance in respect of a period of service of seventeen years two months and two days; but on the invitation of the judge the respondent waived any claim in respect of the two months and two days.

The decision of the High Court was that the findings of the Courts below on the facts were right, and that in any event the service of an officer, in so far as it was performed before the commencement of the Civil Service Act, 1884, need not, for the purpose of the calculation of a superannuation allowance under s. 48 of that Act, be of the same nature as such service is required

(1) [1903] A. C. 208.

J. C. to be under the definition section (s. 2) of that Act, so long as
 1910 his service since the commencement of that Act has been of the
 WILLIAMS required nature, as the respondent's had been.

v.
 MACHARG. *Sir R. Finlay, K.C., and Austen-Cartmell*, for the appellant,
 contended that the orders of the Courts below were erroneous
 and that judgment should be entered for him. They contended
 that the respondent was not an officer within the meaning of the
 Civil Service Act, 1884, during the period from September 24, 1868,
 to December 31, 1869; and that accordingly his employment
 during that period ought not to have been taken into account for
 the purpose of calculating his superannuation allowance. Also
 that service for a broken part of a year, that is for the ten months
 and twenty-six days by which his service excluding the above
 period exceeded fifteen years, ought not to have been taken
 into account. They referred to *Hales v. Miller* (1) and *Josephson*
v. Young (2) and also to *Walker v. Simpson*. (3)

Acland, K.C., G. S. Robertson, and Sheppard, for the respon-
 dent, contended that during the period in dispute as well as the
 rest of the time of his service in respect of which a claim was
 made for superannuation allowance his employment and service
 were of a permanent nature. He was an officer throughout the
 whole of the time within the meaning of s. 2 of the Public
 Service Superannuation Act, 1899. They referred to the
 Constitution Act, namely, 18 & 19 Viet. (Imperial) c. 54, s. 37,
 and to s. 55 of the Civil Service Act, 1884, and also to *The State*
of New South Wales v. The Commonwealth. (4) The appointment
 held by the respondent for the short period under dispute was
 not a casual temporary appointment, but one of indefinite though
 not lifelong continuance. As such he held it in the character
 of a Civil Service officer within the meaning of the legislation
 relating to superannuation allowances.

Sir R. Finlay, K.C., in reply.

1910
 June 7.

The judgment of their Lordships was delivered by
 LORD MACNAGHTEN. The respondent, John Macharg, was
 a member of the New South Wales Civil Service at the date of

(1) (1905) 5 S. R. N. S. W. 163, 171.

(2) (1900) 21 N. S. W. L. R. 188.

(3) [1903] A. C. 208, 212.

(4) (1908) 6 C. L. R. 214.

the passing of the Public Service Act of 1895. Within twelve months from the commencement of that Act his services were dispensed with by the Public Service Board, but not for any offence or through any fault on his part. As he had not then attained the age of sixty years, he had no claim to a superannuation allowance under s. 43 of the Civil Service Act, 1884. He received a refund of his contributions to the Civil Service Superannuation Account and the gratuity payable under the Act of 1895. Afterwards, on the passing of the Public Service Superannuation Act, 1899, he became entitled to receive the superannuation allowance to which he would have been entitled if he had retired under the provisions of s. 43 of the Act of 1884, subject to the deduction or diminution specified in the Act of 1899.

Sect. 48 of the Act of 1884 declares that the following shall be the scale of superannuation allowances payable under the Act:—
 “To any officer who shall have served fifteen years a superannuation allowance equal to one-fourth of his annual salary, with an addition of one-sixtieth part of such salary for each additional year of service, but in no case shall such superannuation allowance exceed two-thirds of his annual salary.” The allowance was to be computed upon the average annual amount of salary or emoluments other than forage equipment or travelling allowance received during the preceding three years.

The respondent first entered the service of the Government on September 24, 1868, as an officer in a newly constituted branch of the Department of Crown Lands, called the Occupation Branch. The Government records which presumably contained the particulars of his appointment were accidentally destroyed in a fire, known as the Garden Palace fire, but it may be taken that he was appointed as “temporary draftsman.” He is so described in the Blue Book of 1868. What the precise meaning of the word “temporary” in that connection may be is not at all clear. Probably it meant nothing more than that the appointment was made by a minister and not by the Governor in Council, and was regarded in a sense as provisional, not being published in the Government Gazette. Be that as it may, the office itself was clearly of a permanent character, and apparently

J. C.
 1910
 WILLIAMS
 v.
 MACHARG.
 —

J. C.
1910
WILLIAMS
v.
MACHARG.
—

it has been continued up to the present time under the style of assistant draftsman. The respondent was originally employed at a salary of 12s. 6d. per diem, payable monthly. As from January 1, 1870, until September 10, 1872, under appointment by the Governor in Council, he held the office of assistant draftsman, continuing to perform the same duties and to receive, within two or three pounds a year, the same salary as before, his pay during this period being 225*l.* per annum, payable monthly. On September 10, 1872, at the request of the department, he resigned his office and took up the work of a licensed surveyor, and he was so employed until July 14, 1883. On that date he was appointed to the office of inspector and surveyor in the Department of Public Instruction at a salary of 350*l.* per annum. He held that office until his services were dispensed with on September 30, 1896.

It is not disputed now that the respondent was an officer in the Civil Service from January 1, 1870, to September 10, 1872, and also from July 14, 1883, to September 30, 1896, and that he is consequently entitled to a superannuation allowance on the footing of fifteen years' service. The only question at issue has reference to the period of the respondent's service as temporary draftsman from September 24, 1868, to December 31, 1869.

The respondent claimed to reckon that period as additional service. The Government rejected his claim. The contention on the part of the Government was that during that period he was not an officer in the Civil Service, but only a person employed temporarily, and therefore excluded from the position of officer by the definition of the term "officer" in the Civil Service Act, 1884. And in aid of that argument some reliance was placed on certain expressions to be found in the judgment of this Board in the case of *Walker v. Simpson*. (1)

In resisting the respondent's claim, the advisers of the Government of New South Wales appear both to have misapprehended the effect of the Act of 1884 and to have misconstrued the judgment of this Board in *Walker v. Simpson*. (1)

The interpretation clause in the Act of 1884 is no doubt at

(1) [1903] A. C. 208.

first sight rather perplexing, but it becomes tolerably plain if regard is had to the scope of the Act and due attention is paid to the precise language used.

The main object of the Act was the reorganization of the Civil Service as constituted at the date of the Act, and the classification of its members. With that object principally in view the interpretation clause (s. 2) defines " ' Civil Service ' or ' Service ' " as " the body of persons now or hereafter appointed to permanent salaried offices in the service of the Government " with certain exceptions, such as the judges of the Supreme and District Courts and persons holding appointments in the military or naval service and others whom it is not necessary to specify. Now there seem to be two points especially to be noted. In the first place the definition clause has no application to the Civil Service as constituted before the passing of the Act. It was only concerned with the then present members of the Service and their successors. In the next place it is to be observed that the definition clause does not speak of persons permanently appointed to salaried offices, but of persons appointed to permanent salaried offices. It is the holding of a permanent salaried office which constitutes membership, not the quality or duration of the tenure. Then the section proceeds to define the term " officer. " " Officer " is defined as " any person holding office in the Civil Service, " that is in the body of persons at the date of the passing of the Act and subsequently for the time being constituting the Civil Service " other than those mentioned in sections 7 and 8, " that is persons in the railway services and persons holding offices of a somewhat humble grade, as messengers and people of that class, " and teachers under the Educational Division " who are excepted by s. 3, sub-s. 3, " and persons employed temporarily. " The question is, who are the persons referred to as " persons employed temporarily " ? In the argument on behalf of the Government an observation was made to the effect that the interpretation clause was drawn somewhat carelessly. It was said that having regard to the definition of " Civil Service " it would seem that persons temporarily employed were already excluded, and there was no point in excluding them over again. But that appears to be a mistake.

J. C.

1910

WILLIAMS

v.

MACHARG.

J. C.
1910
WILLIAMS
v.
MACHARG.
—

A person temporarily employed might be a member of the Service by virtue of his office if it were a permanent salaried office. It is hardly to be supposed that any draftsman of ordinary intelligence would take pains to exclude specifically from a definite class persons on whom a sentence of exclusion had already been pronounced. Then what is the meaning of persons employed temporarily? The reference seems to be to s. 31, which declares that in any public department persons may be temporarily employed by the minister, but that no such person shall be qualified for admission to the Service by reason of such temporary employment until he has passed the prescribed examination, and then goes on to declare that such temporary employment shall cease at or before the expiration of two years. It would seem that the interpretation clause must refer to that section, inasmuch as all persons temporarily employed in permanent salaried offices at the date of the Act were, with all other officers, to be classed in some one of the divisions and classes mentioned in s. 3 (the lowest class being a probationary class), and there could be no fresh appointment of temporary employees except under s. 31.

Such, then, being the scope and effect of the interpretation clause, and that clause being confined as regards the definition of "officers" to persons holding office at the date of the passing of the Act or subsequently thereto, it is to be observed that the Act does recognize persons as "officers" in respect of office held antecedently to the passing of the Act. Office antecedent to the passing of the Act is obviously recognized in the provision for superannuation allowances. Otherwise no one would be in a position to claim such an allowance until the expiration of fifteen years from the date of the passing of the Act. And in s. 56 persons are described as "officers" in virtue of office held at the date of the passing of the Constitution Act of 1855. The result, therefore, seems to be that the Act of 1884 regards as "officers" (1.) persons holding permanent salaried offices in the Civil Service at the date of the passing of the Act of 1884 and their successors, other than persons excluded by the exception in the definition of the term "officer" in the Act, and (2.) persons holding permanent salaried offices in the Civil Service

antecedently to the passing of the Act to whom the exception in the definition clause cannot apply.

One word as to the judgment in the case of *Walker v. Simpson*. (1) Having pointed out that licensed surveyors are not salaried officers, or even members of the Civil Service, the judgment concludes by saying that Simpson, the respondent in that case, was not, during the period when he was a licensed surveyor, an officer within the meaning of the Act. The language of the judgment seems to be perfectly accurate. Simpson was not excluded by reason of the exception in the definition; for the exception would have had no application in his case if he would have been an "officer" but for the exception. He was not an officer within the meaning assigned to the term "officer" in the interpretation section or within the meaning which the term "officer" must bear in other sections when the Act is describing persons as officers in respect of office held before the passing of the Act.

The result, therefore, is that the appeal fails, and their Lordships will humbly advise His Majesty that it must be dismissed.

The appellant, in accordance with his undertaking, will pay the costs of the respondent as between solicitor and client.

Solicitors for appellant: *Light & Fulton*.

Solicitors for respondent: *Longbourne, Stevens & Powell*.

(1) [1903] A. C. 208.

J. C.

1910

WILLIAMS

v.

MACHARG.

[HOUSE OF LORDS.]

H. L. (E.) MARSHALL APPELLANT;
 1910
 AND
 July 11. OWNERS OF S.S. WILD ROSE AND ANOTHER RESPONDENTS.

Employer and Workman—Compensation—Accident arising out of and in the Course of the Employment—Seaman—Unexplained Drowning—Evidence—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1.

An engineer employed on board a steam trawler lying in a harbour basin went on deck (as he said) to cool himself on a very hot night. His dead body was found the next morning in the water just under the rail on the starboard quarter where he was in the habit of sitting in hot weather. There was no evidence how the death happened:—

Held by Lords Atkinson, Shaw of Dunfermline, and Mersey (Lord Loreburn L.C. and Lord James of Hereford dissenting), that as a matter of fact there was no evidence to shew that the engineer's death was caused by an accident arising out of his employment.

Decision of the Court of Appeal, [1909] 2 K. B. 46, affirmed.

THE circumstances of this appeal, which turned on the special facts, are stated in the judgments.

April 19. *Scott Fox, K.C.*, and *Lowenthal*, for the appellant.
Sir Robert Finlay, K.C., and *Atkin, K.C.* (*Mundahl* with them), for the respondents.

Scott Fox, K.C., in reply.

The following cases were referred to:—*Reed v. Great Western Ry. Co.* (1); *Low v. General Steam Fishing Co.* (2); *Rice v. Swansea Vale Owners* (3); *Robertson v. Allan Brothers* (4); *Fitzgerald v. W. G. Clarke & Son* (5); *Andrew v. Failsworth Society* (6); *Pomfret v. Lancashire and Yorkshire Ry. Co.* (7); *McDonald v. S.S. Banana* (8); *Wakelin v. London and South Western Ry. Co.* (9)

The House took time for consideration.

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| (1) [1909] A. C. 31. | (5) [1908] 2 K. B. 796. |
| (2) [1909] A. C. 523. | (6) [1904] 2 K. B. 32. |
| (3) (1910) 26 Times L. R. 276. | (7) [1903] 2 K. B. 718. |
| (4) (1908) 98 L. T. 821. | (8) [1908] 2 K. B. 926. |
| (9) (1886) 12 App. Cas. 41. | |

July 11. LORD LOREBURN L.C. My Lords, this has been to me an anxious case, because of the view adopted by the Court of Appeal, from which I am always slow to differ, though I think Fletcher Moulton L.J. had some doubts. It involves two quite distinct questions. The first is, does the evidence warrant the conclusion of fact reached by the county court judge, that this unfortunate man fell into the water by accident? The second is whether, if that be so, the accident was one "arising out of the employment of the deceased." I wish to avoid confusion between those two separate points.

H. L. (E.)
1910
MARSHALL
v.
OWNERS
OF S.S.
WILD ROSE.

In regard to the first of these questions, I observe that in none of the opinions delivered in the Court of Appeal is the conclusion of the learned county court judge controverted, though it was assailed in argument at the Bar of this House. We know, on the evidence, that on the evening of May 27 the *Wild Rose* was in Aberdeen Harbour. At 10.10 P.M. Marshall came on board, went below, and took off all his clothes except his trousers, shirt, and socks. It was a very hot night. He subsequently came out of his berth, saying he thought he would go on deck for fresh air. The crew always sat on the starboard quarter against the fishboard. Marshall went on deck with his trousers, shirt, and socks on. At midnight he was not on deck. His body was searched for next morning and found just underneath where the crew usually sat. Beyond this we know nothing.

Now in the affairs of life, where much is often obscure, men have to draw inferences of fact from slender premisses. A plaintiff or claimant must prove his case. The burden is upon him. But this does not mean that he must demonstrate his case. It only means that if there is no evidence in his favour upon which a reasonable man can act he will fail. If the evidence, though slender, is yet sufficient to make a reasonable man conclude that in fact this man fell into the water by accident, and so was drowned, then the case is proved. I cannot possibly say the county court judge was wrong, because I also conclude from the slight material before us that this man fell into the water by accident (suicide was not ever suggested) and so was drowned, and I do not believe any jury would hesitate in saying so. Whether he was sitting on the rail or not I cannot conclude, and

H. L. (E.) it is wholly immaterial. But that he fell off the ship by accident
1910 I do not really doubt.

MARSHALL
v.
OWNERS
OF S.S.
WILD ROSE.
—
Lord Loreburn
L.C.
—

The second question is more difficult: Did this accident arise out of Marshall's employment? Let me see what his employment was. The respondent's case tells us that he was second engineer on the *Wild Rose*, a steam trawler. In that capacity he had to serve continuously. Sometimes he would be actually minding the engines. Sometimes he would be off duty in the sense of active duty. But he was in service all the time. His employment was to discharge the duties of second engineer as and when they arose, and, among others, to be on the ship. In the opinion of Farwell L.J. occurs a passage as follows, which brings the matter admirably to a point: "If an ordinary sailor is a member of the watch and is on duty during the night and disappears, the inference might fairly be drawn that he died from an accident arising out of his employment; but if, on the other hand, he was not a member of the watch, and was down below, and came up on deck when he was not required for the purpose of any duty to be performed on deck, and disappeared without our knowing anything else, it seems to me there is absolutely nothing from which any Court could draw the inference that he died from an accident arising out of his employment."

Now I am not able to take that distinction. The employment being to be on board, I cannot see that an unexplained accident must arise out of the employment if it happen while he is on an active part of his occupation, and cannot so arise if he is for the time being at leisure. In either case you have first to ascertain if the man went overboard by accident as best you can, the difficulty of so ascertaining being equal whether he was on watch or not. And if he did fall overboard by accident it equally arose out of his employment whether it occurred during that part of the voyage when he was actually working or that part when he was resting from his work. The employment, by the very nature of it, exposes him to certain dangers whether at work or not, one of which is falling or being washed off his ship. And if in the course of that employment the man being on the ship accidentally perishes by one of those dangers, I do think the accident arises out of the employment.

In saying this I am anxious not to give countenance to the idea that whenever an accident occurs to a person who is continuously employed it must be taken to have arisen out of the employment. If a seaman had his eye injured, for example, by a comrade striking a match to light his pipe, it could not come within the Act. But I think it is within the Act when the danger is one of those incidental to the employment. In the present case the arbitrator has so found, and I think he was entitled so to find.

H. L. (E.)

1910

MARSHALL

v.

OWNERS
OF S.S.
WILD ROSE.Lord Loreburn
L.C.

LORD JAMES OF HEREFORD. My Lords, the facts of the case are not the subject of dispute. On May 27, 1908, Charles William Marshall was in the employ of the respondent company. He had to act as second engineer on board the steam trawler *Wild Rose*. The circumstances attending the deceased leaving his cabin on the night of that day, and going on deck to obtain cooler air, and the fact of his being found drowned are set out with apparent agreement in the cases of the appellant and the respondents. Upon those facts as stated the learned county court judge felt justified in coming to the conclusion that the death of Marshall arose through his sitting upon the rail and falling off into the water.

I think that there is justification for this finding. There were no grounds for suggesting suicide. Going on deck for fresh air, it seems natural that Marshall should sit down rather than remain standing. Then where would he sit? Rollo, his companion on board the trawler, in his evidence, stated, "We always sat on starboard side against fishboard." The respondents in their case refer to this evidence with apparent concurrence. Then Rollo proves that Marshall's body was found next morning "just underneath where we usually sat." I think, therefore, it may be taken that there was a recognized habit, prompted by convenience, for the men when resting to sit on the rail, and that no objection was taken to their so doing by any one in authority. If this be so, Sir Robert Finlay's argument that Marshall might be regarded as if he had been sitting on the end of the bowsprit cannot be maintained. It was not usual, or reasonable, or authorized for a man to sit on the end of a bowsprit.

H. L. (E.)
 1910
 MARSHALL
 v.
 OWNERS
 OF S.S.
 WILD ROSE.
 ———
 Lord James of
 Hereford.
 ———

It is an admitted fact that the deceased man was in the employ of the respondents, and that in pursuance of that employment he was on board the ship on the night of his death. Being there, he was not departing from that employment if he sought the better air of the deck rather than remain in the closer atmosphere of the cabin. Having reached the deck it was reasonable that he should sit down and not remain standing. It was also reasonable to expect that he would sit upon the rail rather than upon the bare deck. In order to carry out his employment he was resting, and when resting the accident happened.

But it remains to be determined, did the death of the deceased arise out of his employment? I think it did.

Now what do the words "arising out of the employment" mean? They are vague words, very different in their effect from such words as "caused by the employment." This seems to point to an indirect connection with the employment, and I think they are fulfilled if the accident occurred during the employment and under circumstances which shew that the injured person had not at the time of the injury departed from the controlling incidents of the employment.

It may be that independent circumstances may shew that an accident occurring during the employment did not arise out of it, but if the conditions I have mentioned are fulfilled, the burden of establishing such circumstances must be borne by the employer.

The words of the statute "arising out of the employment" are, as I have said, somewhat vague, but I read them, as I think they ought to be read, liberally, and, doing so, it seems to me that the facts of this case establish a right to compensation, and that therefore the appeal should be allowed.

LORD ATKINSON. My Lords, in this case the Court of Appeal have held that the applicant has not discharged the burden of proof which lay upon her, namely, the burden of proving that her husband had met his death by an accident "arising out of and in the course of his employment." In my opinion they were right. The finding of the learned county court judge (to paraphrase the language of Lord Watson in *Wakelin v. London*

and South Western Ry. Co. (1)) was not, I think, an inference which could be reasonably drawn, as a matter of fact, because there were no data from which such an inference could be drawn, so much as a conjecture or surmise, which there were, no doubt, ample materials to justify.

The evidence, so far as it is material, is this. At 10 o'clock on the night on which the deceased was missed—it was a very hot night—he came on board with his companion and went below, stripped himself to his shirt, trousers, and socks, got into his berth, and subsequently came out of his berth and passed his companion, saying he was going on deck for “fresh air,” or a breath of fresh air. He was not seen by that companion when the latter went on deck at 12 o'clock. His body was found next morning floating in the water just underneath a place on the starboard side of the vessel, where either the crew, or the deceased and his companion, whichever it be,—the word “we” alone is used,—usually sat. That is all. There is nothing to shew that he did not deliberately jump or throw himself into the water beyond the greater probability of accident as compared with suicide. No evidence whatever was adduced to shew what the structure of the trawler was, whether her bulwarks were so low that he might readily have fallen over them, or so high that he could not have fallen over them. Nothing is stated as to the condition of the vessel's deck, or as to the manner in which she was moored, or whether she was in such a position that the body of the deceased must have been kept precisely in the place in which it fell into the water; but because it was found under the place where it is alleged the crew, or some of them, usually sat, it is assumed apparently that he was sitting in that place, and in some way or other fell in from there; whereas, for all that appears, he might have fallen into the water from some other part of the vessel, and his body, either owing to his struggles, if he did struggle, or to some other cause, have floated to the place where it was found.

The argument urged in support of this appeal appears to me to resolve itself into something like this. A seaman lives on his ship. It is one of the duties of his employment to do so. Whether he works at his proper work, or sleeps, or rests, sits, or stands

H. L. (E.)

1910

MARSHALL

v.

OWNERS

OF S.S.

WILD ROSE.

Lord Atkinson.

H. L. (E.)
 1910
 MARSHALL
 v.
 OWNERS
 OF S.S.
 WILD ROSE.
 Lord Atkinson.

or moves about, the relation of master and servant continues to exist between him and his employer, and therefore he does each and all of these things in the course of his employment. If, therefore, he sustains a personal injury while on board his ship in some unexplained and unknown way, it must be assumed that the injury was caused by an accident arising out of and in the course of his employment. He may by his own carelessness or thoughtlessness or wilful misconduct have exposed himself to a new danger, not at all incidental to the doing in a reasonable way of any of the things which he is by the express or implied terms of his employment bound or privileged to do, such, for instance, as by dozing to sleep at night on the bulwarks of his vessel instead of in his bunk, to prepare for work next day ; yet though this new danger be the cause of the accident by which he is injured, it must still be presumed to be an accident arising not only in the course of his employment, but, in addition, out of his employment.

Sir Robert Finlay, in illustration of his argument, took the case of a female domestic servant who was obliged to live in her master's house, as the seaman is obliged to live on his ship, and assumed that she was seen to enter her bedroom some hot and sultry night, and next morning the window of her room was found open and her lifeless body found on the pavement beneath. She might have thrown herself out, or dozed asleep and fallen out, or overbalanced herself while awake and fallen out. On the principle for which the appellant contends it should be presumed she was killed by an accident arising out of and in the course of her employment, because in the course of her employment she was undoubtedly entitled to rest and to breathe fresh air ; but it does not appear to me to be either a reasonable, ordinary, or proper way of resting or taking fresh air to lean out of a window at night at a time when sleep may readily overtake her. It could not be assumed that she or her master ever contemplated such a risk as attendant upon her service when she entered upon it. The peril to her was, I think, a new peril arising out of her own careless and reckless act, and not a peril incident to or connected with the performance of the duties of her employment, or the enjoyment in a reasonable and

proper manner of those rights and privileges to which she might be entitled as preparations for her active work. The accident caused by that new peril could not in such a case, I think, be held to arise out of her employment. The only difference between that case and the present lies in the fact that this seat was said to be an accustomed seat ; but does that make any real difference ?

A workman may be bound or entitled to frequent a certain place, or do a certain thing, under certain conditions, and if an accident happened to him while frequenting that place or doing that thing, under those conditions, it might well be held that that accident arose out of his employment ; but it by no means follows that the same result should be arrived at if the conditions were entirely changed before he does the particular thing or frequents the particular place. The alteration in the conditions may have made that perilous which was theretofore safe—so perilous, indeed, that, in the absence of actual proof, it could not be presumed that the employer or workman ever contracted or contemplated that the peril should or might be encountered as one of the risks connected with the employment. Even, therefore, if this seat on the bulwarks, near the fishboard, was one which the crew, with the express or implied permission of the master of the ship, used in their waking moments, so as to cause an accident arising from its use at such times to be rightly held to have arisen out of the employment, it by no means follows that the risk attending the use of the same seat for sleeping on at night was ever contemplated by the parties as a risk incident to the employment.

Even, therefore, if it had been proved (which it was not) that the deceased when he left his bunk sat upon this seat, then having regard to the time at and circumstances under which he did it, and the great probability that he would drop asleep, it does not, in my opinion, at all follow that the risk of falling into the water was a risk incident to or connected with his employment, while his ship was in port and at such a time and under such circumstances, or his drowning an accident arising out of his employment ; though it may well be that the risk of being blown or swept overboard or of falling overboard while his ship

H. L. (E.)

1910

MARSHALL

v.

OWNERS
OF S.S.
WILD ROSE.

Lord Atkinson.

H. L. (E.) 1910
MARSHALL
v.
OWNERS
OF S.S.
WILD ROSE.

was at sea was such a risk. One cannot help feeling sympathy for the applicant, but if any force is to be given to the words of the statute, she must, in my opinion, be held to have failed to discharge the burden of proof resting upon her.

LORD SHAW OF DUNFERMLINE. My Lords, in this case the known facts are few and simple. A sailor, partially dressed, left his sleeping berth in a ship lying in a tidal basin, and proceeded to the deck, having remarked to his companion that he was going up to cool himself. This happened at 10.10 on the night of May 27, 1908. Next day his dead body was found in the harbour just under the fishboard, which was at a part of the gunwale where the members of the crew sometimes sat down. From these, which are the only facts proved, the county court judge inferred that the deceased met his death by accident arising out of and in the course of his employment, and he found the shipowners liable in compensation under the Act of 1906. The learned judges of the Court of Appeal have found that it is not established that the death occurred by accident arising out of and in the course of his employment. They appear to concede, or are willing to take it for granted, that the death occurred by accident, and that the accident may be looked upon as having occurred in the course of the employment, but recognizing that they are bound also, before liability can emerge under the Act, to hold that the accident arose out of the employment, they cannot do so, and they decide accordingly.

My Lords, I feel constrained to agree with their conclusion. It has been reached after great concessions or assumptions in favour of the appellant, and on those, in my opinion, it has been properly reached. But for my own part I do not conceal that I should have some difficulty in making those concessions or assumptions. The facts in every case may leave here and there a hiatus which only inference can fill. But in the present case, my Lords, the name of inference may be apt to be given to what is pure conjecture. What did the sailor Marshall do when he left his berth and went on deck? Nobody knows. All is conjecture. Did he jump overboard, walk overboard, or fall overboard? One

can infer nothing, all is conjecture. Was there an accident at all, or how and why did the deceased unhappily meet his fate? No doubt the occurrence took place during the period of his engagement, but did it take place in the course of his employment, or, as Sir Robert Finlay justly argued, in the course of some occupation grafted on to his employment but in no way part of it, necessary to it, or usual in it? There can be, in my view, nothing dignified with the name of an inference on this subject, but again only conjecture.

Finally, if mere conjecture be legitimate, how can it reach the point that an accident causing the death by drowning of this man occurred not merely in the course of his employment, but arose out of that employment? The answer to this is, that he was a sailor on his ship, and the ship was surrounded by water. Had the ship been at sea one could have understood the answer better, because the sailor might have been pitched overboard by the rolling of the vessel or blown overboard by the wind. These would have been the perils surrounding the seaman's life and duty, and injuries or accidents through them might well enough be held to fall within the category of things arising out of and in the course of the employment. But in the present case such a question does not arise, for the ship was lying quietly in port. The deceased man left his sleeping berth and went on deck, and the nearest conjecture to an inference that was placed before this House was that he had seated himself on the side of the ship, and fallen asleep and overboard. No one would attribute misconduct to him in selecting that place, or even the rigging, to rest upon during the night rather than in his berth, and, of course, it is argued that since he was under engagement and doing no wrong, the accident to him arose in the course of his employment. But how it can be said to have arisen out of it I do not understand. It arose out of some voluntary act of the deceased, in no way springing from his employment, necessary to his employment, or usual in his employment.

This being so, how is the Act of Parliament to be construed? To keep to the case of death alone, the statute provides that, "if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman,

H. L. (E.)

1910

MARSHALL

v.

OWNERS
OF S.S.
WILD ROSE.Lord Shaw of
Dunfermline.

H. L. (E.) his employer shall . . . be liable to pay compensation" in
 1910 respect of the workman's death. I do not see my way to hold
 MARSHALL that this is equivalent to saying the employer is liable to pay
 v. compensation in respect of the death of any workman should the
 OWNERS death occur during the period, and at the place, of his service.
 OF S.S. To do so would, in my opinion, be to interpret a language
 WILD ROSE. setting up definite conditions and canons of liability as if it were
 Lord Shaw of really a life insurance. It is settled law that a claimant, in
 Dunfermline. invoking the statute, must establish that the conditions and
 canons of liability which it sets up have been satisfied. But the
 interpretation argued for by the appellant would wipe those
 conditions and canons out.

I desire, however, specifically to guard against my opinion being any precedent in what I may call the ordinary case of a sailor, whose life is sacrificed in circumstances of mystery—say, of loneliness during a night watch or confusion during a storm. The performance of duty in such circumstances would raise presumptions of a kind consistent with the seaman's case completely satisfying the conditions laid down by the Act. I think the view expressed on that subject in the latter part of Farwell L.J.'s judgment to be both humane and sound. The present case, however, I hold, for the reasons above expressed, to be of a totally different character.

I agree with the opinion that the appeal should be dismissed.

LORD MERSEY. My Lords, for the purpose of dealing with this appeal I accept the statement of facts in paragraphs 3 to 6 inclusive of the appellant's case.(1) It is not necessary

(1) 3. On May 27, 1908, at 5 A.M., the steam trawler *Wild Rose*, with a cargo of fish and with Marshall on board in his capacity as second engineer, arrived at Aberdeen, and was moored in the harbour basin there. After the fish on board had been disposed of, the *Wild Rose* remained in the harbour basin for the purpose of taking in bunker coal, but the captain gave orders

that with a view to proceeding to North Shields steam was to be up at midnight. Marshall, as second engineer, would have had to be on duty for the purpose of getting up steam pursuant to the orders.

4. Marshall and Rollo, the first engineer of the *Wild Rose*, went on shore in the evening for the purpose of posting certain post-cards. Shortly after 10 o'clock at night they

to recapitulate them. The only question to be determined is whether these facts afford any evidence upon which the county court judge could reasonably find that the death of Marshall was caused by accident arising out of his employment. The Court of Appeal were of opinion that they afforded no such evidence, and I think their decision was right. It is said that the accident was due to the man's sitting on the rail of the ship and falling from it. I think this is probably true, although I fail to find any legal evidence in support of the statement. But I do not see how it can reasonably be said that to sit on the rail of the ship was in any sense connected with the man's employment. I agree with Sir Robert Finlay that it would be as reasonable to say that to sit on the end of the bowsprit would be an act connected with his employment, and if sitting on the rail was no part of his employment, falling from it cannot be an accident arising out of his employment. I do not overlook the statement in the case that the engineers were in the habit of sitting on this rail. I can well believe it to be true. But that the men were in the habit of doing a thing which was not an incident of their employment cannot, in my view, bring any resulting accident within the meaning of the Act.

I do not regard this case as laying down any general principle.

H. L. (E.)
1910
MARSHALL
v.
OWNERS
OF S.S.
WILD ROSE.
Lord Mersey.

returned on board the *Wild Rose* and went below to their respective berths, which adjoined each other, and lay down there, Marshall taking off all his clothes except his trousers, shirt, and socks.

5. The night was a very hot night. After Marshall had remained in his berth for some time he got up and went on deck, dressed as he had been when lying down, that is to say in only his trousers, shirt, and socks, and as he passed the berth in which Rollo was lying he said to Rollo that he was going on deck for a breath of fresh air in order to cool himself. Marshall was not in the habit of leaving his ship without

being fully dressed, but in hot weather he and Rollo were in the habit of going on deck to cool themselves at night dressed as they were when lying down, and on such occasions they were in the habit of sitting on the rail on the starboard quarter of the *Wild Rose*, against the trawling or fish board.

6. Marshall was not seen again during that night, but upon the morning of May 28 it was found that he had been drowned, and his dead body was found in the waters of the harbour basin directly below the rail on which he and Rollo were in the habit of sitting in hot weather.

H. L. (E.) It turns entirely on its particular facts; and taking the view that
1910 I do of those facts, I think the appeal fails.

MARSHALL
v.
OWNERS
OF S.S.
WILD ROSE.

*Order of the Court of Appeal affirmed and appeal
dismissed with costs.*

Lords' Journals, July 11, 1910.

Solicitors : *Maples, Teesdale & Co., for G. W. Chapman, North
Shields; Williamson, Hill & Co., for R. & R. F. Kidd, North
Shields.*

[HOUSE OF LORDS.]

H. L. (E.) MOORE (PAUPER) APPELLANT;
1910 AND
July 18. MANCHESTER LINERS, LIMITED . . . RESPONDENTS.

*Employer and Workman—Employment—Accident arising out of and in the
Course of the Employment—Ship—Ladder—Workmen's Compensation Act,
1906 (6 Edw. 7, c. 58), s. 1, sub-s. 1.*

A seaman employed on a ship in port went ashore after work was over with leave of absence, bought necessities for himself, and spent some time in drinking. On returning to the ship at midnight, while climbing a ladder insecurely fixed between the quay and the ship (the only means of communication), he fell into the water and was drowned:—

Held by Lord Loreburn L.C. and Lords Ashbourne and James of Hereford (Lords Macnaghten and Mersey dissenting), that the accident arose out of and in the course of his employment and that the seaman's widow was entitled to compensation.

Lords Macnaghten and Mersey held that the accident did not arise out of or in the course of his employment, the seaman having gone ashore for his own purposes.

Decision of the Court of Appeal, [1909] 1 K. B. 417, reversed.

THE circumstances of this appeal are stated in detail in the judgments of Lord Loreburn L.C. and Lords Macnaghten, James of Hereford, and Mersey.

June 16. *C. A. Russell, K.C., and T. C. P. Gibbons*, for the appellant. There was evidence on which the county court judge could reasonably find that Moore met his death by accident

arising out of and in the course of his employment. There is no evidence that he left the ship without leave; there is negative evidence that he had obtained leave, for there is no entry in the log-book or record of his absence as required by the Merchant Shipping Act, 1894, s. 228. It was certainly his duty to return to the ship and he attempted to do so. This case differs from *McDonald v. Owners of S.S. Banana* (1), in which it was not shewn why the man went ashore. It was known that Moore was going for the avowed and proper purpose of obtaining necessaries. In *Robertson v. Allan Brothers* (2) compensation was awarded though the man was guilty of a breach of discipline. *Low v. General Steam Fishing Co.* (3) is decisively in the appellant's favour. *Hewitt v. Owners of Ship Duchess* (4) was wrongly decided.

H. L. (E.)
1910
MOORE
v.
MANCHESTER
LINERS,
LIMITED.

Atkin, K.C., and *R. M. Montgomery*, for the respondents. The decision of the Court of Appeal in this case was approved in this House in *Low's Case*. (3) It is for the appellant to prove his case and to shew that he was away from his ship on duty and not for his own purposes. *Low's Case* (3) is different, as the man was on a spot which lay within the range of his duties. *McDonald v. Owners of S.S. Banana* (1) is precisely in point: see Kennedy L.J.'s judgment. The absence of record affords no evidence, as no entry is made in the log-book except where proceedings are to be taken.

C. A. Russell, K.C., in reply.

The House took time for consideration.

July 18. LORD LOREBURN L.C. My Lords, in this case a seaman, after being ashore with some of his comrades, in climbing from the quay to the ship on his return by a ladder which was not very firmly fixed, fell into the water and was drowned. How he came to be ashore is in dispute, whether on ship's business or without leave or with leave for his own purposes. Upon this question of fact I will not detain your Lordships, because Fletcher Moulton L.J. has stated his reasons

(1) [1908] 2 K. B. 926.

(2) (1908) 77 L. J. (K.B.) 1072.

(3) [1909] A. C. 523.

(4) [1910] 1 K. B. 772.

H. L. (E.)
1910
MOORE
v.
MANCHESTER
LINERS,
LIMITED.
Lord Loreburn
L.C.

for thinking that the deceased was ashore with leave for his own purposes so clearly that I cannot do better than adopt what he says, being myself of the same opinion.

In these circumstances it was not, I think, contested that the accident which caused death arose out of the employment; the danger of falling from a ladder which gave the only access from quay to ship being in its nature incidental to the service of a seaman. The point on which there was a marked and emphatic difference of opinion in the Court of Appeal was whether or not in this case the accident occurred in the course of the employment, which is quite a different question.

My Lords, I agree with the conclusion at which Fletcher Moulton L.J. arrived.

When we speak of a workman being employed it means that he is engaged to do certain things at certain times and in certain places. If the question be whether an accident befell him "in the course" of that employment, the first inquiry is, Was he doing any of the things which he might reasonably do while so employed? A seaman going ashore without leave is not doing what he might reasonably do. He simply quits his employment for the time. Otherwise, if he goes ashore with leave, for the employment is continuous and implies leisure as well as labour. The next inquiry is, Did the accident occur within the time covered by the employment? A man engaged for so many hours a day is in the employment only during those hours. If engaged for a month continuously day and night he is in the employment during the whole month, except, of course, during any time he quits the employment. The last inquiry is, Did the accident occur at a place where he may reasonably be while in the employment? In some classes of work, especially where the engagement is intermittent, for so many hours a day, the place is the actual scene of his labour, a railway or quarry or factory. In other classes of work, where the engagement is continuous for day and night over a period of time, the place is wherever he may reasonably be during that time.

And so, to sum it up, I think an accident befalls a man "in the course of" his employment if it occurs while he is doing what a man so employed may reasonably do within a time

during which he is employed, and at a place where he may reasonably be during that time to do that thing. H. L. (E.)

It may seem at first sight that this is a formidable interpretation. It is not so in reality, because in every case the accident, to be a ground for compensation, must also be one arising out of the employment. A seaman, for example, who is ashore on leave and is knocked down by a waggon, is not injured by an accident arising out of his employment. But if he is sent ashore on ship's business he is doing that errand in the same position as a messenger, and is protected against the same risks.

I believe, and hope, that these conclusions, derived as they are after a study of the numerous cases decided in the Court of Appeal, stand in general harmony with those decisions. The case of *Robertson v. Allan Brothers & Co.* (1) seems to me directly in favour of the appellant on the point, which, to my mind, is here crucial. The case of *McDonald v. Owners of Banana* (2) was decided on insufficiency of evidence, and if any of the dicta in the course of the judgments be irreconcilable with *Robertson's Case* (1), I ought to, and I do, pay the greater deference to the actual decision. Another decision was, with a curious persistency, claimed in argument as an authority in favour of the now respondents. I mean the decision of this House in *Low or Jackson's Case*. (3) It has no bearing on the appeal before your Lordships. The majority of the House thought that as the accident happened on a ladder between the quay and the ship, and both quay and ship were within the area of the duty of deceased, it arose in the course of his employment. The minority, including myself, thought that the deceased had quitted his duty altogether, and that in climbing the ladder to get into the ship he was merely in the act of returning from an unlawful excursion undertaken for his own purposes.

I am therefore of opinion that the award of the county court judge was valid, and should be restored.

LORD ASHBOURNE. My Lords, I concur in the conclusion arrived at by the Lord Chancellor.

(1) 77 L. J. (K.B.) 1072.

(2) [1908] 2 K. B. 926.

(3) [1909] A. C. 523.

H. L. (E.)
 1910
 ~~~~~  
 MOORE  
 v.  
 MANCHESTER  
 LINERS,  
 LIMITED.  
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 Lord
 Ashbourne.

The case must be decided on its own facts, although in some points they may resemble the facts of other cases. On the findings of the judge there is little dispute as to the facts, and the sole question is, Was death caused by an accident arising out of and in the course of the employment of the deceased?

He and four of his shipmates left his ship with the knowledge and I assume with the sanction of his officers for the purpose of making necessary purchases of soap and clothes. For this purpose he went to a dealer's selected by the steward, a shop where he was accorded a credit, measured and paid by the same authority. After spending some time at a saloon he proceeded to return to the ship as was his duty to be ready to begin work early the next morning. The mode of access to the ship was by a ladder which was not fixed and which swayed, and, in the words of the judge, was an unsafe contrivance. But it was the only mode by which deceased could fulfil his necessary duty of returning. This ladder attached to the ship was a requisite of it for the purposes of access, and practically for that purpose almost formed part of it. The deceased fell off the ladder whilst seeking to re-enter the ship.

On the facts, I arrive at the conclusion that the accident arose out of and in the course of his employment, and therefore I think the appeal should be allowed.

LORD MACNAGHTEN. My Lords, James Moore, the deceased, was a fireman on the steamship *Manchester Exchange*, belonging to the respondent company, when he met his death in the early morning of May 8, 1908. His ship was then lying at the Bush Docks, South Brooklyn, New York. He and four of his shipmates had gone ashore on the evening of May 7. Their work for the day was over, and in ordinary course they would not be wanted for active duty till the next morning. It is not proved that they had leave to go ashore. They seem to have thought they were at liberty to go, and the learned county court judge took the same view. They went to get some necessities, tobacco, matches, underclothing and soap, from a man named Sabath, who was, as they had been told, authorized to supply them with goods to the value of five dollars a man. It seems to

me immaterial to consider whether they had leave of absence or not. The point of the case, in my opinion, is that they went ashore for their own purposes. They were about their own business, not the business of the ship. After leaving Sabath's shop they went to a public-house and spent the rest of the evening there drinking and singing. Then, when closing time came, they made their way to the docks. There was no proper gangway between the quay and the ship. The only means of communication was a ladder lashed to the ship's sails and hanging free, which, according to the finding of the learned county court judge, "was an unsafe contrivance and particularly dangerous at night to a man who had been drinking." By it they landed and by it they meant to return. Three of the men got on board safely. Then came the fourth man, Brown, and, last of all, Moore. Moore fell off the ladder into the water and was drowned. Brown, who was in front and uppermost, did not see what happened. They were talking on the ladder—these two men. The last thing Brown heard Moore say was this: "I have got the price of a drink for to-morrow night. I have got twenty cents." Then he heard a splash and the man was gone. He was never seen again living or dead. Was that a personal accident arising out of and in the course of Moore's employment?

H. L. (E.)
1910
MOORE
v.
MANCHESTER
LINERS,
LIMITED.
Lord
Macnaghten.

I agree with the Master of the Rolls and Farwell L.J. in thinking that it was not.

It was not, I think, in the course of the man's employment. The course of employment had been interrupted by the man going ashore for his own purposes, and although he was on the very point of resuming his employment he had not actually done so when the fatality occurred. Nor did the accident, in my view, arise out of the employment. In my view the man's employment had nothing to do with the accident except that it may be said that if the man had not been employed on the *Manchester Exchange* he would not, in all human probability, have lost his life on that particular night and in that particular way.

LORD JAMES OF HEREFORD. My Lords, the question to be determined in this case is whether the death of the deceased

H. L. (E.)
 1910
 MOORE
 v.
 MANCHESTER
 LINERS,
 LIMITED.

Lord James of
 Hereford.

husband of the plaintiff arose out of and in the course of his employment. Several points were argued at the Bar with a strenuousness which seemed to shew that they were regarded as decisive of the case. In my view some of them were minor points incidental only to the question stated above.

It is admitted that the deceased man was in the employ of the respondents; that on May 7, 1908, he was serving as a fireman on board the *Manchester Exchange*, a vessel belonging to the respondents. On that day the vessel arrived at Brooklyn. The deceased man, James Moore, and others of the hands required some necessaries, including clothes and soap. For these they applied to the steward, but such goods were not supplied by the ship, and the steward referred the men to one Sabath, a tradesman in Brooklyn, and certainly told the men that they might go to Sabath's shop and obtain thereat the goods which I think were required for the purpose of fulfilling their employment on board the ship, a credit being opened with Sabath for that purpose.

Now much stress has been laid on the fact that the deceased did not obtain the permission required by the American Government to be obtained by foreign sailors to entitle them to land. But that is a mere incident, and was alleged to be only material as shewing that it was probable that the deceased had no other permission to leave the ship. Let it be assumed that no such American permission was issued. Its absence may represent an infringement of the law of the United States. But this is an action between English subjects, and the issue now being tried between them is in no way affected by the alleged breach of American law by James Moore.

I therefore concur in the view expressed by Fletcher Moulton L.J. that the deceased man committed no breach of duty in visiting Sabath's shop. He did not conceal his leaving the ship, and his associates in such departure were not punished or reported.

If the deceased man was rightfully away from the ship it would certainly be within his duty, and so within his employment, to return to the ship. He did so by the ladder from which he fell, the only means of reaching the ship provided for him.

From these facts, thus construed, the answer to the question I have above stated has to be framed. Of course, a man during his employment may meet with an accident which is not caused by and does not arise out of it. A servant engaged for a year may, for his own pleasure, go on a boating excursion and be drowned; such an accident would not be caused by or arise out of the employment. But following the judgments given by the majority of this House in the case of *Low* or *Jackson* (1), I submit to your Lordships that the death of the deceased man occurred not only in the course of the employment, but also arose out of it. The words "arose out of" are vague and somewhat indefinite and must, I think, be construed broadly. Moore left the ship for the purpose of obtaining goods which enabled him to carry out his employment; surely an accident occurring during the absence for such purpose arose out of the employment.

H. L. (E.)
1910
MOORE
v.
MANCHESTER
LINERS,
LIMITED.
Lord James of
Hereford.

But on the part of the respondents more stress was laid on the words "in the course of the employment." My Lords, if the accident arose during the employment, and arose out of it, I find it difficult to say on the facts of this case that this accident did not take place in the course of the employment. I accept the judgment of Fletcher Moulton L.J. on the point. I therefore think that this appeal should prevail.

LORD MERSEY. My Lords, this was an action brought by the widow of a deceased workman under the provisions of the Workmen's Compensation Act, 1906.

The facts are as follows:—The deceased man was a stoker employed upon the defendants' ship. On May 7, 1908, the ship was lying in port. At 8 P.M. on that day the deceased went on shore with some of his shipmates to buy soap and clothing, of which he was in need. There is some conflict in the evidence as to whether he obtained leave to go ashore, but I think the county court judge intended to find that he did obtain leave, and I therefore assume that he did. The man made his purchases, and afterwards, with his mates, he visited some drinking saloons. In this way he spent his time until midnight. He was then in

H. L. (E.)
1910
—
MOORE
v.
MANCHESTER
LINERS,
LIMITED.
—
Lord Mersey.

a condition which may be inferred from the finding of the county court judge, that "he seemed capable of walking back to the vessel." He was not, however, drunk, and he found his way to the quayside. There was a ladder reaching from the quay to the deck of the ship. This ladder had been placed there to enable people to get on board. It was not fixed, and it swayed about. To adopt again the finding of the county court judge, it was "an unsafe contrivance, and particularly dangerous at night to a man who had been drinking." The deceased attempted to go up this ladder. He fell from it into the water and was drowned.

These are the facts, and the question of law is whether they afford any evidence upon which the county court judge could reasonably find that the accident arose "out of and in the course of" the man's employment, so as to bring the case within the meaning of the statute. The Master of the Rolls and Farwell L.J. thought they did not, but Fletcher Moulton L.J. took a different view and thought they did. I think the view taken by the majority of the Court was right, and for this reason I think that when the man asked for leave to go ashore for his own business and pleasure and went, his employment for the time being was suspended; it ceased to run, and nothing that happened to him during the period that he was away can be said to have arisen either "out of" or "in the course of his employment."

If the man had slipped and hurt himself in one of the drinking saloons, or if he had stumbled over a step at the door in coming out of the saloon, even though he was coming out with the intention of rejoining his ship, I think the accident could neither be said to arise out of nor in the course of his employment. And I see no difference between such an accident and the falling from the ladder, for it cannot be contended that the ladder was any part of the ship. It might be different if the master of the ship, in the interests of cleanliness and decency, had ordered the man to go ashore to buy the soap and clothing. It might, perhaps, then have been said that the man was engaged in his employment while obeying such order; but even in such a case, if after finishing the purchases the man began a round of pleasure, the employment would, I think, temporarily come to an end.

In the present case, however, no order was given to the man; he merely got leave to go, and then went away from the ship for his own exclusive purposes, and, unfortunately, he never succeeded in returning. Going out for personal purposes and for pleasure is no doubt (to use Fletcher Moulton L.J.'s expression) "a normal incident" in a man's life, but it is not a normal incident of a man's "employment"; and if so, no accident which arises in connection with it can reasonably be said to arise either out of or in the course of the employment. To hold otherwise would, in my opinion, be to stretch the Act of Parliament so as to make it cover cases to which it was never intended to apply—a misfortune alike to employers and to their men.

H. L. (E.)
1910
MOORE
v.
MANCHESTER
LINERS,
LIMITED.
—
Lord Mersey.

I think the appeal ought to be dismissed.

Order of the Court of Appeal reversed and award of Judge Parry restored with costs here and below; the costs in this House on the pauper scale.

Lords' Journals, July 18, 1910.

Solicitors: *Johnson, Weatherall & Sturt, for Field & Cunningham, Manchester; Botterell & Roche, for Vaudrey, Oppenheim & Mellor, Manchester.*

[HOUSE OF LORDS.]

H. L. (E.) GALBRAITH APPELLANT ;
1910
AND
June 23. GRIMSHAW AND ANOTHER RESPONDENTS.

Attachment of Debts—Scottish Judgment—Extension to England—Garnishee Order Nisi—Service on Garnishee—Subsequent Bankruptcy of Judgment Debtor in Scotland—Rights of Trustee in Bankruptcy—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 117.

A judgment for a sum of money which was obtained in an action in Scotland was extended to England under the Judgments Extension Act, 1868, and the judgment creditor served a garnishee order nisi on a firm who owed a debt in England to the judgment debtor.

After the service of the garnishee order nisi the whole estate of the judgment debtor was sequestrated under the Scottish bankruptcy law and transferred wherever situated to the appellant as trustee for the creditors with power to recover all estates, debts, or money due to the judgment debtor. In an interpleader issue in England between the trustee and the judgment creditor as to their respective claims to the garnished debt:—

Held, that the judgment creditor had by the service of the garnishee order nisi obtained an attachment in England before the date of the sequestration, and that the Scottish Court had no power to interfere with his claim.

Decision of the Court of Appeal, [1910] 1 K. B. 339, affirmed.

THE facts material to this appeal are stated in the head-note. The dates are as follows: October 23, 1908, judgment for 311*l.* and costs in an action in Scotland by Grimshaw and another against Merrens & Sons; October 26, judgment extended to England; October 27, garnishee order nisi in respect of 400*l.* owed to Merrens & Sons in England served upon the firm in England who owed the 400*l.*; November 12, sequestration in Scotland of the estate of Merrens & Sons; December 7, confirmation of the appellant as trustee of the sequestrated estate.

In the interpleader issue between the appellant and the respondents (Grimshaw and another) as to their respective claims to the garnished debt Ridley J. gave judgment for the appellant. This decision was reversed by the Court of Appeal

(Farwell, Buckley, and Kennedy L.JJ.), who entered judgment for the respondents. Hence this appeal.

June 22, 23. *Radcliffe, K.C.*, and *Pringle*, for the appellant.

The garnishee order nisi did not transfer the property in the sum garnished from the judgment debtor, nor did it create a charge. There is in our law no term which exactly defines the right of a garnishor, which has been described as a lien or security; it is something like a distingas on stock. A receiver in a debenture-holders' action is entitled to precedence over the garnishor, although appointed after the garnishee order: *Norton v. Yates* (1); *Geisse v. Taylor* (2); *Cairney v. Back*. (3) A garnishee is but a stakeholder. In *Rogers v. Whiteley* (4) Lord Watson said: "The effect of an order attaching all debts . . . is to make the garnishee custodier for the Court, of the whole funds attached." In *In re Combined Weighing and Advertising Machine Co.* (5) it was held that a garnishee order does not create between garnishor and garnishee any debt either at law or in equity. *Holmes v. Tutton* (6) was like the present case, and the title of the assignees in bankruptcy prevailed.

H. L. (E.)

1910

GALBRAITH
v.
GRIMSHAW.

The Court will recognize and give effect to a foreign bankruptcy: *Sill v. Worswick*. (7) In *Solomons v. Ross* (8) the title of the administrator of "desolate" estates in Holland was preferred to that of a person who had, like a garnishor, attached moneys of the bankrupt. A similar order with respect to Irish property was made in *Neale v. Cottingham* (9), referred to in the same note, and in *Jollet v. Deponthieu*. (10) The question must be decided according to Scottish and not English law.

Rawlinson, K.C., and *H. Dobb*, for the respondents. By the order of the King's Bench Division the respondents acquired a lien or charge for the money lodged in Court by the garnishees, and that charge had priority to the rights of the appellant. The money was bound in the hands of the garnishees. The garnishees could not pay the money due to the bankrupt to any one else

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| (1) [1906] 1 K. B. 112. | (6) (1855) 5 E. & B. 65. |
| (2) [1905] 2 K. B. 658. | (7) (1791) 1 H. Bl. 665. |
| (3) [1906] 2 K. B. 746. | (8) (1764) 1 H. Bl. 131, n. |
| (4) [1892] A. C. 118, at p. 122. | (9) (1764) 1 H. Bl. 133, n. |
| (5) (1889) 43 Ch. D. 99. | (10) (1769) 1 H. Bl. 132, n. |

H. L. (E.) than the respondents. On the order's becoming absolute the money attached becomes the property of the creditors. Sect. 117 of the Bankruptcy Act, 1883, is only machinery, and is no authority for introducing English law into a Scottish bankruptcy. When the garnishee order was obtained the rights of the Scottish creditors and of the appellant had not come into existence; they only arose on November 12, when the petition was presented. There is no authority for applying the provisions of s. 45 of the Bankruptcy Act, 1883, which require that an execution or attachment must be completed in order to prevail over the trustee's title, to Scotland. The question must be decided by English and not Scottish law. In the cases cited from Henry Blackstone time was the governing consideration and the title of the assignees in bankruptcy was prior to the garnishee order. On the effect of an arrestment, which is the equivalent of a garnishee order, Lord Deas' judgment in *Goetze v. Aders* (1) supports the respondents.

Radcliffe, K.C., in reply.

LORD LOREBURN L.C. My Lords, in this case I think that the conclusion arrived at by the Court of Appeal ought to be supported.

To my mind your Lordships would be wise to apply the rule explained by Lord President Inglis in the case of *Goetze v. Aders*. (2) I think that rule is applicable in England also. The attachment in England will not prevail against a claim of a foreign trustee in bankruptcy which is prior in date, provided that the effect of the bankruptcy is to vest in the trustee the assets in question. If the attachment is prior in date, then I do not think it will be affected by the title of the trustee in a foreign bankruptcy; and the reason is that a foreign law making the title of the trustee relate back to transactions which the debtor himself could not have disturbed has no operation in England, while the English law as to relation back applies only to cases of English bankruptcy, and therefore the trustee may find himself (as in this case) falling between two stools.

I think, my Lords, in each case the question will be whether

(1) (1874) 2 R. 150, 155.

(2) 2 R. 150.

the bankrupt could have assigned to the trustee, at the date when the trustee's title accrued, the debt or assets in question situated in England. If any part of that which the bankrupt could have then assigned is situated in England, then the trustee may have it; but he could not have it unless the bankrupt could himself have assigned it. It follows that the trustee cannot have this debt free from the garnishee order, because the bankrupt could only have assigned it on November 12, subject to the garnishee order.

H. L. (E.)
1910
GALBRAITH
v.
GRIMSHAW.
Lord Loreburn
L.C.

My Lords, with regard to s. 117 of the Bankruptcy Act, 1883, I think that affects procedure and does not enlarge the rule to which I have alluded. And I am not prepared to accept and act upon the case which is scantily reported in the volume of Blackstone's Reports to which we have been referred. (1) I am not prepared to accept that case as an authority against the rule which I have referred to.

I will not say, my Lords, that there may not be exceptions to that rule; as, for example, if the effect of the foreign bankruptcy were to transfer to the trustee only part of the assets of the bankrupt. Such points, to my mind, ought not to be settled or treated as settled except after consideration of the cases in which they actually arose. But I think it is enough to say in the present case I see nothing that should disturb the rule or the principle to which I have adverted.

LORD MACNAGHTEN. My Lords, this is rather a singular case. If the bankruptcy had been an English bankruptcy, the attachment, being uncompleted, would not have prevailed against the claim of the judicial factor or the trustee in bankruptcy. If the attachment, or the process in Scotland that corresponds more or less with attachment, had been pending there, the claim of the judicial factor or the trustee in bankruptcy must have succeeded. But, as it is, a creditor of the bankrupt having duly obtained an attachment in England before the date of the sequestration cannot, I think, be deprived of the fruits of his diligence.

It may have been intended by the Legislature that bankruptcy

(1) *Solomons v. Ross*, (1764) 1 H.Bl. 131, n.

H. L. (E.) 1910
GALBRAITH
v.
GRIMSHAW.
—
Lord
Macnaghten.
—

in one part of the United Kingdom should produce the same consequences throughout the whole kingdom. But the Legislature has not said so. The Act does not say that a Scotch sequestration shall have effect in England as if it were an English bankruptcy of the same date. It only says that the Courts of the different parts of the United Kingdom shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy. The English Court, no doubt, is bound to carry out the orders of the Scottish Court, but in the absence of special enactment the Scottish Court can only claim the free assets of the bankrupt. It has no right to interfere with any process of an English Court pending at the time of the Scotch sequestration. It must take the assets of the bankrupt such as they were at that date and with all the liabilities to which they were then subject. The debt attached by the order nisi was at the date of the sequestration earmarked for the purpose of answering a particular claim—a claim which in due course would have ripened into a right. With this inchoate right the Scottish Court had no power to interfere, nor has it even purported to do so. Therefore I think the appeal fails.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD DUNEDIN. My Lords, I concur with the opinions which have been delivered. I think that the general principle which underlies every bankruptcy system is that after bankruptcy the bankrupt is no longer really the owner of his own property, but holds his own property as trustee for the whole of his creditors for equal division. That carries with it necessarily the idea that some of his creditors may already have got security or may have taken part of the property in execution. And if the matter went no further than that it is quite clear that both of those positions would be good as against the bankrupt himself and consequently as against the rest of his creditors. It is a very natural development of that in working out a bankruptcy system that you should introduce a law of relation back, and that within a certain period, which will always be an arbitrary period determined by positive enactment, you should hold that the

security given or the execution effected should have no effect and that that property should be like the rest of the property of the bankrupt.

H. L. (E.)

1910

GALBRAITH

v.

GRIMSHAW.

Lord Dunedin.

Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the Court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution ; and that I take to be the doctrine at the bottom of the cases of which *Goetze v. Aders* (1) is only one example. But if you wish to extend that not only to the question of recognizing a process of universal distribution but also of introducing the law of relation back, then it seems to me you at once get into rather great difficulties, because the question at once arises, according to which law will you apply the doctrine of relation back ? If you take the law of the country of the bankruptcy, then the execution or security in question may be and often is of a kind which is quite foreign to the system of law which you are administering in the Bankruptcy Court. If on the other hand you take the law of the country of the attachment, then you have to administer a law which is quite ignorant of the precise execution or security with which it has to deal. Accordingly, to say the least of it, there has been quoted to us no instance where as a question of international law a Court has applied the rule of relation back, and certainly there are dicta of Lord President Inglis which seem to point completely the other way. Of course that would not prevent the matter being dealt with in the United Kingdom by means of positive enactment. I entirely concur with what fell from the noble and learned Lord on the woolsack as to the true meaning of s. 117.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 23, 1910.

Solicitors: *Heath & Hamilton ; Julius A. White.*

(1) 2 R. 150.

[HOUSE OF LORDS.]

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| H. L. (E.) | WHITEMAN AND ANOTHER | APPELLANTS ; |
| 1910 | AND | |
| July 25, | SADLER | RESPONDENT. |

Money-lender—Registration—"Usual trade name"—Carrying on more than one Business—Contracts in registered Name—Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2.

Under the Money-lenders Act, 1900, s. 2, sub-s. 1 (a), a name assumed by a money-lender for the first time for the purpose of registration cannot be described as his "usual trade name."

A money-lender who under different names carries on one business as an individual and another as a member of a partnership firm carries on business "in more than one name" within the meaning of s. 2, sub-s. 1 (b), and incurs the penalty imposed by s. 2, sub-s. 2, of the Act.

The provision in s. 2, sub-s. 1 (c), strikes at a money-lender who is actually registered by the registration authorities and contracts otherwise than in his registered name, and not at a money-lender who being so registered contracts in that name.

Decision of the Court of Appeal, [1910] 1 K. B. 868, affirmed on the first two points (Lord Mersey dissenting as to the first point). Decision reversed on the third point.

THE circumstances of this appeal are stated in the judgments of this House.

By the Money-lenders Act, 1900, s. 2, sub-s. 1, "A money-lender as defined by this Act—(a) shall register himself as a money-lender in accordance with regulations under this Act, at an office provided for the purpose by the Commissioners of Inland Revenue, under his own or usual trade name, and in no other name, and with the address, or all the addresses if more than one, at which he carries on his business of money-lender; and (b) shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address; and (c) shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name;"

June 27, 28. *Shearman, K.C.*, and *Schwabe*, for the appellants. The appellants were duly registered under the Act under their usual trade name and in no other name, and with the address at which they carried on their business. There must be a beginning in the use of a name, and a registration effected for the purpose of carrying on a money-lending business is a registration in the usual trade name, although the person or firm registering may not have previously traded in that name. Money-lenders were bound to register at the passing of the Act, and a name never previously used must have been contemplated by the Legislature. The words simply import one name, one business. It is open to intending borrowers to inspect the register, and, to use Lord Watson's words in *Salomon v. Salomon & Co.* (1), a person "who will not take the trouble to use the means which the statute provides for enabling him to protect himself must bear the consequences of his own negligence." The regulations under the Act regard the usual trade name as something in the future. This was the view adopted by Bray J. in the Court below and previously by Bucknill J. in *Stirling v. Silburn & Pyman*. (2) *Victorian Daylesford Syndicate v. Dott* (3) is not applicable as no name was registered at all.

There is nothing in the Act to prevent a man from simultaneously trading as an individual and as a partner in a firm. The Act does not forbid a man to be registered twice. It does prohibit the carrying on the same business in more than one name. It is not criminal for a man to have one business in one place and an interest in another business in another place. There is invalidation of the contract only where there is no registration at all: *Victorian Daylesford Syndicate v. Dott* (3); *Bonnard v. Dott*. (4) A contract made in a name registered according to the regulations is not invalid.

The fine imposed by s. 2, sub-s. 2, is the only penalty for breach of the Act. In *Pidgeon v. Burslem* (5) a man who had purported to act as a broker but was not licensed was held not entitled to recompense for his services, but to be entitled to

H. L. (E.)

1910

WHITEMAN

v.

SADLER.

(1) [1897] A. C. 22, 40.

747, n.

(2) [1910] 1 K. B. 67.

(4) [1906] 1 Ch. 740.

(3) [1905] 2 Ch. 624; [1906] 1 Ch.

(5) (1849) 3 Ex. 465.

H. L. (E.) repayment of money which he had paid at the defendant's request.
1910

WHITEMAN

v.
SADLER.

Spencer Bower, K.C., and C. A. McCurdy, for the respondent. The appellants were not lawfully registered as money-lenders inasmuch as they were not registered under any name which was either their "own name" or their "usual trade name" within the meaning of s. 2, sub-s. 1 (a), of the Act. The "usual trade name" means the name which at the date of registration had become attached to the money-lender in his trade. It would be wrong to treat the firm as a person. Each of the appellants was a separate person and each would have to make a separate income tax return. Payment to one of them or by one of them would be the same thing as if both made payment or received the money. Partners could not be treated as ignorant of each other's acts. The purpose of the double names could only be to disguise the money-lender's identity, which was the very mischief which the statute was designed to prevent. The business was itself illegal, and the illegality attaches to all its contracts. The penalty is not a sufficient deterrent and the Legislature makes the game not worth the candle. This was decided to be the law in *Cope v. Rowlands* (1); *Bensley v. Bignold* (2); *Fennell v. Ridler* (3); *De Begnis v. Armistead*. (4) In *Melliss v. Shirley Local Board* (5) Bowen L.J. says: "If you can find out that the act is prohibited then the principle is that no man can recover in an action founded on that which is a breach of the provisions of a statute."

In *Shaw v. Benson* (6) an unregistered loan society was held to be an illegal society and unable to recover on its promissory notes. In *Fergusson v. Norman* (7) a pawnbroker who omitted the requirements of the statute (39 & 40 Geo. 3, c. 99, s. 6) was held to have acquired no property in the property pledged to him and not to be able to maintain a lien against the assignees of the pawner. A party to a fraudulent arrangement must bear the loss though he cannot reap the benefit: *In re*

(1) (1836) 2 M. & W. 149.

(2) (1822) 5 B. & Al. 335.

(3) (1826) 5 B. & C. 406.

(4) (1833) 10 Bing. 107.

(5) (1885) 16 Q. B. D. 446, 454.

(6) (1883) 11 Q. B. D. 563.

(7) (1838) 5 Bing. N. C. 76.

Myers. (1) The Court will take note of illegality whether it be pleaded or not. H. L. (E.)

Shearman, K.C., in reply. In *Kerrison v. Cole* (2), cited by Tindal C.J. in *Fergusson v. Norman* (3), a security on a ship was, indeed, held to be void for want of registration, yet it was held that at common law the contract for money lent and interest might be enforced.

1910
WHITEMAN
v.
SADLER.
—

The House took time for consideration.

July 25. LORD LOREBURN L.C. My Lords, I had purposed to express my view of this case in detail, considering the differences of opinion which have emerged both in this House and in the Courts below. But having had an opportunity of seeing in print the opinions of Lord Macnaghten and Lord Dunedin, I find myself in accord with and will simply adopt their conclusions.

My Lords, Lord Ashbourne is unfortunately unable to be present to-day, and he has therefore asked me to say on his behalf that he agrees with the judgments of Lord Macnaghten and Lord Dunedin.

LORD MACNAGHTEN. My Lords, the action which has given rise to this appeal was brought against Arthur George Whiteman and Walter Elphick Whiteman, trading in partnership as money-lenders under the registered name of "Cobb & Co.," by a person who had obtained from them a loan repayable with interest by instalments, and secured by a registered bill of sale.

Default was made in payment of one of the prescribed instalments, and thereupon the money-lenders seized the goods comprised in the bill of sale.

The writ in the action was issued on March 7, 1909. It claimed damages for trespass and wrongful seizure and an injunction.

On April 7 following an order was made in chambers, giving the debtor liberty to pay within a week (under protest and

(1) [1908] 1 K. B. 941.

(2) (1807) 8 East, 231.

(3) 5 Bing. N. C. 76.

H. L. (E.) 1910
WHITEMAN
v.
SADLER.
—
Lord
Macnaghten.

without prejudice to his contention that the bill of sale was invalid and that he was entitled to damages) the amount claimed by the defendants for principal, interest, and costs, and directing that thereupon the defendants should enter up satisfaction and the action should proceed as to damages only. In the meantime an injunction, which had originally been granted *ex parte*, was continued.

Under this order the defendants were paid the sum of 187*l.* 13*s.*, and satisfaction was entered on the registered copy of the bill of sale.

The statement of claim was then delivered, and the action proceeded in due course. The plaintiff's case on the pleadings was that the defendants were not entitled to rely on their alleged security, because the transaction which resulted in the bill of sale took place, as he suggested, elsewhere than at the registered address of the defendants, and in the alternative because the bill of sale was, as he alleged, procured by misrepresentation. But when the action was in the list for trial, on an application by the defendants for postponement, an order was made by arrangement to the effect that the statement of claim should be treated as amended by the insertion of an allegation that the bill of sale was void, by reason of the provisions of the Money-lenders Act, 1900, and the addition of a claim for repayment of the money paid under the order of April 7, 1909.

The action came on for trial before Bray J. without a jury. His Lordship held that the charge of misrepresentation was not proved, and he decided in favour of the defendants all the questions of law which, in his view, were necessary for the decision of the case. So the action was dismissed with costs.

On appeal the decision of Bray J. was reversed, and judgment was entered for the plaintiff for 187*l.* 13*s.*, the sum paid under the order of April 7, 1909.

Three questions were argued at the Bar. They were the only material questions determined by the Court of Appeal. Bray J. had dealt with two of them, but in his view of the case the third question did not call for decision.

Now it was admitted that the name "Cobb & Co.," in which the defendants were registered, was assumed for the purpose of

registration. It was a designation under which the defendants had never traded before. It was also admitted that when the defendants applied for registration in the name of "Cobb & Co." the defendant Arthur George Whiteman was already on the register as "Cox & Co."

H. L. (E.)
1910
WHITEMAN
v.
SADLER.
Lord
Macnaghten.

In these circumstances the first question turned on the provision contained in s. 2, sub-s. 1 (a), of the Money-lenders Act, 1900, which enacts that a money-lender, as defined by the Act, "shall register himself . . . under his own or usual trade name and in no other name." Bray J. held that the language of this enactment was ambiguous, and that the expression "usual trade name" was capable of being construed as the trade name under which the money-lender proposes to carry on business. And in the present case he thought that was the true construction. The Court of Appeal, on the other hand, held that a name assumed for the first time for the purpose of registration could not be described as the money-lender's usual trade name. I agree with the Court of Appeal. The proposition seems to me too clear for argument. A disguise which a man assumes for the purpose of concealing his identity cannot, I think, properly be described as his usual attire at the time, even though he means to wear it in future as long as it serves his purpose.

It was argued, indeed, that if the natural or primary meaning of the expression were adopted, it would lead to many difficulties. It would be impossible, for instance, to buy the goodwill of a money-lender's business and carry on the old trade under the old name. Considering the pains which money-lenders take to hide their identity, it may well be that the Legislature did not deem the reputation of a successful money-lender a desirable possession, or a valuable business asset or goodwill in any proper sense of the term. That would seem to have been the view of the framers of the Act. At any rate, by prohibiting the use of any "description" in connection with the registered name (s. 2, sub-s. 1 (b)) they have prevented money-lenders from resorting to the usual method of preserving or indicating continuity in business. Then reference was made to the case of "firms," which are recognized by the Act in s. 3. It is not the practice, it was said, to indicate the names of[†] individual partners in the

H. L. (E.) title or style of a firm. It may be inconvenient to do so if the
 1910 partners are numerous. But certainly it is not impossible, or,
 WHITEMAN indeed, very unusual. The Act, I think, requires it to be done.
 v. Publicity is the very object of the Act and its chief weapon.
 SADLER. After all, this requirement cannot be specially inconvenient in the
 Lord case of money-lenders. They mostly hunt in couples, not in packs.
 Macnaghten.

The second question depends on the provision which I have already cited, and on the prohibition in s. 2, sub-s. 2, which imposes a penalty on a money-lender carrying on business "otherwise than in his registered name or in more than one name." With the utmost respect for Bray J.'s opinion, it seems to me that the Court of Appeal was perfectly right in holding that a man who, under different names, carries on one business as an individual, and another as a member of a partnership firm, does carry on business in more than one name.

So far I think there is no difficulty. The solution of the third question is not so easy. What is the consequence of holding that the registration, on which the defendants rely, is not in accordance with the requirements of the Act? Sect. 2, sub-s. 1 (c), provides that a money-lender "shall not enter into any agreement in the course of his business as a money-lender, with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name." Farwell L.J., from whom the other members of the Court did not differ, held that if the registered name was placed on the register in contravention of the Act, there was "no name registered at all within the Act." He held, moreover, that even if that were not so, the contention on the part of the money-lenders would not be correct, on the principle "that a contract which is expressly forbidden and made criminal by Act of Parliament can give no cause of action to a party thereto who seeks to enforce it." His Lordship observed that he saw "no practical difference between carrying on the money-lending business in more than one name in violation of s. 2, sub-s. 1 (a), or at an address other than his registered address under (b), and entering into agreements under (c)." If and so far as any money-lending is done in breach of those sub-sections "such money-lending," he observes, "is forbidden by the Act

and made criminal, and can therefore form no ground for a civil action by the money-lender."

No one questions the principle to which Farwell L.J. refers. The application of the principle, however, in any particular case must depend on the provisions of the Act of Parliament under consideration, and the circumstances of that case.

I must confess that I have felt considerable difficulty in coming to a conclusion on this point, but on the whole I am of opinion that the bill of sale taken in the registered name of the money-lenders is not void, although the name was, I think, improperly registered.

I think the true view of the Act is this: The Act requires a money-lender, as defined by the Act, to register himself as a money-lender, in accordance with regulations under the Act, at an office provided for the purpose by the Commissioners of Inland Revenue. That is s. 2, sub-s. 1 (a). By s. 3, sub-s. 1, the Commissioners are to "make regulations respecting the registration of money-lenders . . . the form of the register, and the particulars to be entered therein." A money-lender registered under these regulations is to carry on the money-lending business in his registered name and in no other name. That is s. 2, sub-s. 1 (b). He is not to enter into any agreement in the course of his business otherwise than in his registered name. That is s. 2, sub-s. 1 (c). It would be a strong thing to hold that a person whose name has been placed on the register by the officers of a public department, in conformity with regulations purporting to be issued under the authority of Parliament, becomes liable to fine and imprisonment, and the absolute loss of all his contracts, not for trading without registration but for trading in a registered name, registered, I admit, wrongly, but registered by the authorised exponents of the requirements of the Act and the statutory custodians of the register. If, in violation of the plain words of the Act, a money-lender trades without being registered at all, or being registered trades in another name, he is very properly left to the mercy of any one who chooses to attack him, and his contracts are rightly avoided. But if he is registered by the Commissioners and registered improperly, the fault does not lie with him alone. The Commissioners are at least equally to

H. L. (E.)

1910

 WHITEMAN
 v.
 SADLER.

 Lord
 Macnaghten.

H. L. (E.)
 1910
 WHITEMAN
v.
 SADLER.
 Lord
 Macnaghten.

blame. It was said that a money-lender registers himself; the Commissioners have to accept the entry proposed, if it is not in contravention of their published regulations. I do not think that is what the Act meant. The Commissioners have important duties cast upon them. In a great measure the execution of the Act is placed in their hands. Their regulations ought to be clear and explicit, and the forms of application for registration issued by them ought not to afford room for evasion.

By a wise foresight, or a fortunate chance, the Act has not left persons entirely unprotected who may be misled or not guided aright by the directions issued by the Commissioners. In the case of an alleged infringement of sub-s. 1 (*a*), the sub-section with which the Commissioners are mainly concerned, no prosecution can be instituted except with the consent of the law officers. No such provision is made with regard to (*b*) or (*c*). This seems to me to shew that what the Act meant to strike at in (*c*) was the case of a person actually registered by the Commissioners contracting otherwise than in his registered name, and that, so long as his name remains on the register, his contracts in that name are not to be held void, or his action in making contracts in that name punishable by fine and imprisonment.

I venture to hope that the Commissioners of Inland Revenue will issue regulations which may be a guide to persons proposing to register, and not an occasion for stumbling, and that they will repair the error they have committed by removing, on proper notice, names wrongly registered, and taking care in future that, so far as in them lies, the requirements of the Act shall be complied with.

In this way, and by these means, the Act, it may be hoped, will regain power, and at the same time command respect. As administered by the Board of Inland Revenue it loses half its virtue. As construed by the Court of Appeal it leads to a result which one of the learned judges of that Court describes as "dishonest and demoralizing."

I think the action should be dismissed with costs.

LORD DUNEDIN. My Lords, the appellants in this case, A. G. Whiteman and W. E. Whiteman, were, on August 12, 1908,

registered as the firm of Cobb & Co. under the Money-lenders Act, 1900. In November, 1908, they lent a sum of 250*l.* to the respondent upon the security of a bill of sale upon the furniture and effects in his premises at 68, South Croxted Road, West Dulwich. The terms of repayment were that the loan was to be repaid by six monthly instalments with 40 per cent. interest on the sum outstanding.

H. L. (E.)
1910
WHITEMAN
v.
SADLER.
—
Lord Dunedin.
—

Default having been made in payment of an instalment on March 28, 1909, the appellants took possession under the bill of sale.

The present action is one for damages for trespass and illegal seizure, and also at first contained an injunction to restrain the appellants from selling or otherwise dealing with the goods.

The action was originally based on averments that the transaction was induced by fraud, and upon an objection to the bill of sale ; but these averments have been disposed of adversely to the respondent and have passed out of the case.

In the progress of the case, however, the respondent paid the appellants the principal and interest due on the debt, and satisfaction was entered up of the bill of sale ; he agreed on the damages as at 40*s.*, and he introduced the further pleas that the contract was void, and consequently the bill of sale invalid, because (1.) the appellants had been registered in a name which at the time of registration was neither their own name nor their usual trade name, and (2.) because one of the appellants, A. G. Whiteman, was at the date of the registration already registered as an individual under the name of Cox & Co.

These are the pleas which have been insisted on before your Lordships' House. Bray J. held that they were bad, and so holding he had not to consider what would have been the effect on the contract had they been good. The Court of Appeal took the opposite view, and, holding that the pleas were good, further held that the effect was entirely to invalidate the contract, and they accordingly ordered repayment of the sum of 185*l.* 13*s.* and payment of the 40*s.* agreed on as damages.

The question raised by the pleas may be shortly expressed thus : (1.) Is it permissible under the Money-lenders Act to register a trade name which has not de facto been used before

H. L. (E.) the registration? And (2.) Is it permissible for a person to register as an individual and also separately in respect of another business as a member of a firm?

1910

WHITEMAN

v.

SADLER.

Lord Dunedin.

On both these questions I agree with the conclusions reached by the Court of Appeal. Sect. 2, sub-s. 1 (a), provides that a money-lender shall register himself in accordance with regulations under this Act . . . under his own or usual trade name, and in no other name. And s. 2, sub-s. 2, imposes a penalty on every money-lender who fails to register himself as required, or carries on business otherwise than in his registered name, or in more than one name. It seems to me clear that the object of the Act is to provide, first, for identification of persons carrying on business as money-lenders, and, secondly, to prevent one man carrying on various businesses under a series of aliases. If that is so, it follows clearly that registration of any person, whether as an individual or as a member of a firm, exhausts, so to speak, that person's capacity of registration; for if it were not so, and if he, being actually registered as an individual, was allowed again to register as member of a partnership, he would be truly carrying on the business of money-lender under more names than one.

It only remains to consider what that one name is to be. His own name presents no difficulty. The only alternative is his usual trade name. I think some force must be given to the word "usual," and that it connotes a name which at the time of registration is known by means of use. It would apply either to going businesses at the time of the Act, or to the case of ordinary commercial businesses being turned into money-lending businesses. It was argued that this view would not fit the case of companies and firms, both of which, it is evident from s. 3, are within the purview of the Act. As to companies there seems no difficulty. A company to apply must have already been incorporated; and its corporate name seems to me just as truly its own name as the name of any individual which becomes his at birth. As regards firms it certainly leads to the conclusion that a new firm would have to register in a name which specified the names of all the partners; but, in view of the obvious desire for publicity, I do not think this a result which need be shrunk from.

I am therefore of opinion that when the appellants applied for registration as Cobb & Co. their demand ought to have been refused on two grounds : first, that the name of Cobb & Co., never up to that time having been used as a firm name of the appellants, was not their "usual trade name"; and second, that A. G. Whiteman being at that moment registered as a money-lender could not be again registered.

H. L. (E.)

1910

WHITEMAN

v.

SADLER.

Lord Dunedin.

The question, however, remains what is the effect of this, and, in particular, does it avoid the contract entered into between the appellants and respondent? The question was rather assumed against the appellants than argued by the learned judges of the Court of Appeal, except Farwell L.J., who rests his judgment on the cases of *Victorian Daylesford Syndicate, Ltd. v. Dott* (1) and *Bonnard v. Dott* (2), of which cases he looks on the present as a legitimate extension. The principle, he says, is that a contract which is expressly forbidden and made criminal by Act of Parliament can give no cause of action to a party who seeks to enforce it.

To the principle, as stated, I do not think any exception can be taken, except that it might, indeed, be amplified by the insertion of the words "or impliedly" after "expressly." But there always remains the question whether the contract is expressly or impliedly forbidden by Act of Parliament. This is not always an easy question. It is simple enough where a certain contract is prohibited. But what of the cases where nothing is said about the contract as such, but certain duties or prohibitions are imposed on certain classes of persons? Are the contracts made by such persons who have failed in their duties or contravened the prohibitions impliedly prohibited, and therefore made illegal by Act of Parliament?

There is a good deal of authority on such matters, but I do not know that the question has been really advanced since the judgment of Parke B. in *Cope v. Rowlands* (3) and that of Tindal C.J. in *Fergusson v. Norman*. (4)

Cope v. Rowlands (3) was a case of a broker suing for his brokerage charges, he not being licensed by the Mayor and

(1) [1905] 2 Ch. 624.

(2) [1906] 1 Ch. 740.

(3) 2 M. & W. 149, 157.

(4) 5 Bing. N. C. 76, 84.

H. L. (E.)
 1910
 WHITEMAN
 v.
 SADLER.
 Lord Dunedin.

Aldermen of the city of London pursuant to 6 Anne, c. 16. By s. 4 of that Act it was provided that all brokers, who shall act as brokers, shall from time to time be admitted by the Court of Mayor and Aldermen, with a proviso which imposed a fine on any one who acted without being admitted. Parke B. states the question thus: "It is perfectly settled that where the contract, which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition. And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that, if the contract be rendered illegal, it can make no difference in point of law whether the statute which makes it so has in view the protection of the revenue or any other object. The sole question is whether the statute *means to prohibit the contract.*"

He goes on to cite some cases where the statute had been held not to strike at the contract, and then, in the case in question, comes to the conclusion that the statute, although directly silent on the point, did mean to prohibit any plying of the trade of broker by a non-admitted person.

In *Fergusson v. Norman* (1) the question arose under the Pawnbrokers Act, and Tindal C.J. adopts and approves of *Cope v. Rowlands*. (2) But he goes on to point out an important distinction. He says "A distinction may easily be drawn as to those duties imposed on the pawnbroker, which are entirely collateral to the individual contract; and it would be too much to say, because he had not observed the enactment of the statute in such matters, that therefore the contract made by him should be void. Suppose an instance in which his name was required to be put up over the door, and some mistake had been made. A penalty is given for not putting up the name, but it would not follow that contracts entered into by an individual, whose name had been incorrectly spelled, would be therefore void."

Other illustrations will readily occur of the extreme consequences which would ensue from pushing the matter to its

(1) 5 Bing. N. C. 76, 84.

(2) 2 M. & W. 149.

extreme logical conclusion, namely, that once a statutory prohibition is contravened, all contracts of the contravener in the course of the business to which the statute refers are void. Take, for example, the Coal Mines Regulation Act. Could it be seriously argued that if it could be discovered that a mine owner had contravened one of the numerous and minute requirements of the Act, he was thereby disabled from recovering from his customers the price of coals which he had sold to them?

The upshot of the matter seems to me that each statute must be judged of by itself. Now in the present statute we find a direct prohibition as to contracts in s. 2 (1.) (c). "A money-lender shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender otherwise than in his registered name."

It seems to me that express enactment shuts the door to further implication. "Expressio unius est exclusio alterius."

I come therefore to the conclusion that the contract here was only void if it was struck at by the prohibition in s. 2 (1.) (c). Was it so struck at? It is said that because we hold the registration to have been an improper registration therefore it was no registration. I do not think so. I think registered name means de facto registered name, and that it would be contrary to all justice to penalize the appellants for what was really a mistake of the Inland Revenue.

The appellants had a registered name, and I think the statute sought only to prohibit dealings in a name which was not registered at all. I entirely agree with the judgments in *Victorian Daylesford Syndicate, Ltd. v. Dott* (1) and *Bonnard v. Dott* (2), but I do not think they cover this case.

I am therefore of opinion that the appeal should be allowed, and the order of Bray J. restored.

I think it not out of place to say that it seems to me that this result is in accordance with ordinary justice; although I agree that if the statute had provided otherwise we should have been bound to enforce its provisions. The judgment of the Court of

H. L. (E.)
1910
WHITEMAN
v.
SADLER,
Lord Dunedin.

(1) [1905] 2 Ch. 624.

(2) [1906] 1 Ch. 740, 747, n.

H. L. (E.) Appeal entitled the respondent to keep money which was never
1910 his. The effect would have been far-reaching; for no one
WHITEMAN need have repaid a money-lender who had, in accordance with
v. the undoubted practice allowed by the Inland Revenue, regis-
SADLER. tered under a firm name when such firm had not existed before
Lord Dunedin. registration.

The Inland Revenue authorities after this judgment will have to change their practice, for I agree that the power of issuing regulations under s. 3 cannot be allowed to override the statutory requirements, as we have interpreted them, of s. 2.

And lastly, while the appellants and others will not have the contracts which they have bona fide entered into in their registered names declared void, they still are and will be liable to have such contracts remodelled if they have been harsh and unconscionable under the very ample and drastic powers of s. 1.

I need scarcely add that the view I take of the case precludes the necessity of considering the special point as to paying back the money arising on the form of the order made in this particular case.

LORD MERSEY. My Lords, the question in this case is whether the Money-lenders Act, 1900, prohibits the contract made by the appellants.

It is said that it does, because the contract was made in breach of three of its provisions. The three provisions are to be found in s. 2 of the Act, sub-s. 1, clauses (a), (b), and (c). Clause (a) requires that a money-lender shall register himself in accordance with regulations under the Act at an office provided for the purpose by the Commissioners of Inland Revenue, under his own or usual trade name, and in no other name. Clause (b) requires that he shall carry on the money-lending business in his registered name, and in no other name, and under no other description; and clause (c) directs that he shall not enter into any agreement with respect to the advance and repayment of money, or take any security for money, otherwise than in his registered name.

The facts, so far as they are material, are as follows: The appellants, who are money-lenders carrying on business under

the style of "Cobb & Co.," made a loan of 250*l.* to the respondent on November 28, 1908, and took, as security, a bill of sale on the respondent's furniture. The bill of sale contained the terms on which the money was lent, and was clearly an agreement with respect to the advance and repayment of money within the meaning of clause (c). The money was to be repaid by instalments. The respondent made default in payment of one of the instalments, and thereupon the appellants, under the powers contained in the bill of sale, took possession of the furniture. The respondent then issued a writ claiming an injunction against the appellants, and also damages for trespass. In the first instance this claim was based on allegations which had nothing to do with the Money-lenders Act, 1900, and which turned out to have no foundation. But, later on in the action, the respondent shifted his ground, and alleged that the bill of sale was void by reason of breaches of one or more of the three provisions of the Money-lenders Act, 1900.

The action was then tried by Bray J., who found that the appellants had not committed any of the alleged breaches, and gave judgment for the appellants. The respondent then went to the Court of Appeal, and that Court reversed Bray J., holding, as I understand, that the appellants had committed all three breaches, and that therefore the contract in the bill of sale was void. It is from this judgment that the present appeal is brought.

I propose to take the last of the three breaches first. That breach, it is said, consists of the appellants' taking the bill of sale otherwise than in their registered name, contrary to the provisions of clause (c). The facts relating to this part of the case are that the bill of sale was taken in the name of "Arthur George Whiteman and Walter Elphick Whiteman" (the names of the appellants) "trading in co-partnership as Cobb & Co." This was a perfectly accurate description of the appellants, but it is said that it was not their *registered* name and that in fact they had no registered name at all. It is therefore necessary to see what the Act of Parliament requires as to registration, and then to inquire what the appellants did by way of complying with those requirements. Sect. 2, sub-s. 1 (a), requires that

H. L. (E.)

1910

WHITEMAN

v.

SADLER.

Lord Mersey

H. L. (E.) a money-lender shall "register himself as a money-lender in accordance with regulations under this Act, at an office provided for the purpose by the Commissioners of Inland Revenue, under his own or usual trade name and in no other name"; and sub-s. 2 of s. 2 enacts that if he fails to do so he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding 100*l.* and possibly to imprisonment. But by sub-s. 3 it is provided that no prosecution in respect of the omission to register as required shall be instituted except with the consent of the Attorney-General. Sect. 3 of the Act provides that "the Commissioners of Inland Revenue, subject to the approval of the Treasury, may make regulations respecting the registration of money-lenders, whether individuals, firms, societies, or companies, the form of the register and the particulars to be entered therein."

1910
WHITEMAN
v.
SADLER.
Lord Mersey.

Now the Commissioners of Inland Revenue have, subject to the approval of the Treasury, made regulations and have drawn up forms for the use of persons desiring to register themselves. The regulations are before your Lordships. They provide that "individuals, firms, societies or companies proposing to start in the business of money-lending for the first time, after the commencement of this Act, must register before doing so," and they further provide that three forms shall be used for the registration, to wit, "Form No. 1 by individuals trading alone, Form No. 2 by unincorporated companies and societies or firms, and Form No. 3 by incorporated companies or societies." The form No. 2, which is intended for use when registering a firm, is the only one to which it is necessary to refer. It is headed in large type "Form for use of Unincorporated Company, Society or Firm," and in smaller type are the words "Return pursuant to the Money-lenders Act, 1900." Then over a blank space are printed the words "Usual trade name in which the . . . firm, carrying on the business of money-lending, is to be registered." In this blank space the "usual trade name" is obviously intended to be inserted. Then below this space is another space headed with the words "Persons of whom the . . . firm consists." In this second space are columns for the insertion of the names and addresses of the partners. Finally, there is a third space for the insertion of the name of the place

where the business is carried on, and at the bottom of the form there is a printed certificate for signature by one of the parties, which is in the following words:—"I, being one of the partners whose names are set forth above, do hereby certify that the above is a true return of the particulars required by section 2 of 63 and 64 Vict. chapter 51."

H. L. (E.)
1910
WHITEMAN
v.
SADLER.
Lord Mersey.

These being the provisions of the Act of Parliament and the regulations made under the Act with reference to registration, what the appellants did was to obtain one of the forms No. 2, the only form issued or available for the purpose of registering a firm. They had determined (as they lawfully might) to trade under the name of "Cobb & Co.," and they accordingly, on August 10, 1908, filled up the form by inserting that name in the space headed "Usual trade name," &c. In the next space they inserted their own names with their respective addresses, and in the third space they wrote the name of the place where the business was to be carried on. Finally, one of them (A. G. Whiteman) signed the certificate at the bottom of the form, and then the document was sent to the proper office at Somerset House, where it was duly filed. This constituted the registration, and one asks, what was the matter with it ? The answer made by the respondent is that "Cobb & Co." was not their "*usual* trade name," and that, as clause (a) requires registration of the money-lender's own or usual trade name, the Act has not been complied with.

That raises the question as to what a usual trade name is, and on this question there has been much difference of opinion. It is said on the one hand that it means merely the name in which the money-lender intends to trade in the future ; on the other hand, it is said that it means a name which he has been using before registration for so long a time and in such circumstances that it has become identified with him and his business. Bray J. in this case took the former view, as did also Bucknill J. in a previous case ; but Fletcher Moulton L.J. and Farwell L.J. in the Court of Appeal took the other view, Vaughan Williams L.J., as I understand his judgment, differing from them and agreeing with Bray J.

I think, for my own part, that Bray J.'s view is the right

H. L. (E.)
 1910
 WHITEMAN
v.
 SADLER.
 Lord Mersey.

one. Inasmuch as no person has been able, since the passing of the Act, to trade lawfully as a money-lender unless he first registered himself, it is obvious that no one who, since the passing of the Act in the year 1900, may have desired to start in that business could acquire a usual trade name in connection with it, if a usual trade name is to be taken as meaning a name acquired by use previous to registration. Bray J. puts the point very clearly in his judgment in the present case. He says: "There never can be a new name adopted by a money-lender unless it be that he is carrying on business, for example, as a grocer as Cobb & Co. and then becomes a money-lender, which, of course, is hardly a probable event." If the view taken by the majority in the Court of Appeal be right, then the appellants, if they were brothers, could not register themselves as "Whiteman Brothers," for that would not be their individual names, nor could it be their usual trade name as money-lenders. And if there were half-a-dozen persons starting in partnership the only way to register would be in the half-dozen names, with the consequence that their business transactions would have to be entered into in all the names, a clumsy and unbusinesslike method which I do not think the Legislature intended should be obligatory. "Usual trade name," in my opinion, in the connection in which the words are used in this Act, means no more than the name which the money-lender proposes to use in the business he is starting, just as the words on the office door, "usual hours of business 10 to 4," would mean that those were to be the hours in which he intended to do business. "Usual," in fact, means "ordinary" and nothing more. This interpretation makes sense of the Act of Parliament and of the form issued under its provisions.

It is also, I think, to be remembered that this is a penal statute, and it seems to me that if each of two interpretations of it is reasonable, that one which protects the subject should be adopted rather than that one which may have the effect of sending him to prison. But even if I am wrong in the view I take as to the meaning of the words, I should still be of opinion that the appellants were "registered." They filled up the return honestly, and it was accepted at the registry and filed

there by the proper officer. The individual names of the appellants are in it; so are their private addresses, so is the name in which they trade, namely, "Cobb & Co.," and so is the place where they carry on their business. This, I think, is sufficient to constitute a *de facto* registration. It may be irregular, but, if so, it is by reason of the misleading way in which the form supplied at the registration office was worded; and regular or irregular, it is a registration and sufficient.

This disposes of the objection taken under s. 2, sub-s. 1 (c).

There remain to be dealt with the objections under (a) and (b). As to (a) it is said that, whether effectively registered or not, for the purposes of (c) the appellants had broken the provision of (a) which requires them to register in their own or usual trade name. I have already stated my reasons for thinking that no breach of this provision had been committed. They had, in my opinion, adopted a usual trade name within the meaning of the Act and they registered themselves under it. But I will again assume that this view is wrong, and that they had broken the provision in question. They had then committed an offence under the Act, and that offence is made penal by sub-s. 2 of s. 2.

As to (b) it is said, and on the facts I think truly said, that one of the appellants (A. G. Whiteman) had carried on the money-lending business in a name other than his registered name, contrary to the provisions of (b). This also is a penal offence. The question, however, is not so much whether the appellants had been guilty of an offence under either (a) or (b); the question rather is whether, assuming that they had, the effect was to prevent them from lawfully making the contract contained in the bill of sale on which they are relying. It was not necessary for Bray J. to consider this question. He found that the appellants had not been guilty of any breach of the statutory provisions, so that the question did not arise before him. Nor was it necessary for the Court of Appeal to consider it, for they came to the conclusion that there had been no registration at all by the appellants, and that, therefore, the bill of sale was void by virtue of clause (c). Farwell L.J., however, did deal with it. In delivering his judgment he says: "The principle is that a contract

H. L. (E.)

1910

WHITEMAN

v.

SADLER.

Lord Mersey.

H. L. (E.) which is expressly forbidden and made criminal by Act of
 1910 Parliament can give no cause of action to a party thereto who
 ~~~~~ seeks to enforce it." He then goes on to say that in this con-  
 WHITEMAN v. connection he sees no practical difference between (a), (b), and (c).  
 SADLER. He adds: "If and so far as any money-lending is done in breach  
 Lord Mersey. of these sub-sections, such money-lending is forbidden by the  
 ~~~~~ Act and made criminal and can therefore form no ground for a  
 civil action by the money-lender."

The principle is quite accurately stated by the learned Lord Justice, but in my opinion it has no application to (a) or (b). There is no express prohibition in either of those clauses, whereas in clause (c) there is. The learned Lord Justice, however, probably means to say that where a statute by implication forbids a contract and makes it criminal it can give no cause of action. This also is an accurate statement of the law. But the question must always arise, does the statute by implication forbid the contract? And the answer depends exclusively on the terms of the statute.

The terms of the statute direct (a) that the money-lender shall register himself under his own or trade name, and (b) that he shall carry on business in none but his registered name; and a penalty is imposed if a money-lender fails to comply with these directions. I think these provisions refer merely to things which a money-lender is required to do or to refrain from doing under a penalty, and stand quite apart from the question of the money-lender's capacity to make contracts. I think so because I find (c) expressly deals with contracts for lending money, and in terms forbids them to be made otherwise than in the registered name, whereas (a) and (b) make no mention of contracts and are silent as to the effect which a breach is to produce upon them. Moreover, some of the breaches of (a) and (b) might be quite insignificant. The money-lender might, when registering, misspell his name or be guilty of some trifling mistake about his address, or he might for a day or two carry on the money-lending business at some other than his registered address; in such cases it would be impossible, I think, to say that he had incapacitated himself from doing further business; and if impossible to say it where the breach is small, it must, I

think, be impossible to say it where the breach is more serious. Another reason for saying that only a breach of (c) invalidates a contract may also be found in the consideration of clause (d) of s. 2, sub-s. 1. That clause (which is penal like the others) requires the money-lender to furnish to the borrower, on reasonable request and on tender of a reasonable sum of money, a copy of any document relating to the loan. The money-lender may make a mistake and demand a few shillings more than what a Court may think reasonable. He thus breaks clause (d). But could it possibly be said that such a breach would invalidate a contract? I think not; and these considerations lead me to the conclusion that the only clause the breach of which invalidates contracts is clause (c), which in terms says that no agreement shall be made otherwise than in the registered name.

I might let the matter rest there, but it is perhaps worth while to point out the consequences which would follow from holding otherwise. To hold otherwise would render not only this particular transaction void, but also every other transaction of money-lending which the appellants have entered into since they started in business; and would authorize every borrower from them to do that which the respondent desires to do in this case, namely, to refuse to pay back the money lent. Farwell L.J. dealt with this point and said: "The repudiation of all liability to repay even the money actually advanced is dishonest and demoralizing to the borrower, but that was doubtless present to the mind of the Legislature in 1900." If the learned Lord Justice had limited this observation to (c), which in terms prohibits a contract made in violation of its provisions, I should have agreed with him.

The Legislature no doubt thought that the importance of requiring money-lenders to use their registered names when making money-lending agreements was paramount, and justified the risk of the borrowers being dishonest enough to refuse to pay back the money they had had. But that the Legislature, in its anxiety to protect the borrowers, intended by an implication to afford them further opportunities of being dishonest and becoming demoralized I cannot bring myself to believe. No such intention can, in my opinion, be found in the Act. I come,

H. L. (E.)

1910

WHITEMAN

v.

SADLER.

Lord Mersey.

H. L. (E.)
1910
WHITEMAN
v.
SADLER.
—
Lord Mersey.

therefore, to the conclusion that these money-lenders were in fact registered, and that they took the bill of sale in their registered name, thereby complying with the requirements of (c). Further, I think they registered themselves in their "usual trade name" and so complied with (a). But I think they violated the terms of (b) by one of the partners carrying on the money-lending business apart from the business of the firm of "Cobb & Co." Assuming, however, that they were guilty of a breach both of (a) and (b), I do not think that they thereby rendered this contract void.

I think the appeal should be allowed and the judgment of Bray J. restored.

LORD JAMES OF HEREFORD. My Lords, I had prepared a judgment in this case, but since writing it I have had the advantage of perusing and listening to the judgments delivered by four of my noble and learned friends. With much contained in those judgments I concur, but there are also some points upon which I entertain considerable doubt.

Still, as the decision of your Lordships' House is already to be found in the judgments delivered, it seems to me to be of no avail for me to explain those doubts. I therefore feel that the better and more practical course is for me to withdraw my intended judgment, which course I now take.

Order of the Court of Appeal reversed and order of Bray J. restored with costs here and below.

Lords' Journals, July 25, 1910.

Solicitors: *Windybank, Samuell & Lawrence; Durham, Carter & Durham.*

[HOUSE OF LORDS.]

SIR WILLIAM GORDON GORDON-CUMMING APPELLANT; H. L. (SC.)
 AND 1910
 JAMES HAMILTON HOULDSWORTH . . . RESPONDENT. July 21.

Vendor and Purchaser—Contract—Sale of Estate by General Name—Use of Plan—Scottish Law.

Where an estate is sold as shewn upon a plan and there is no dispute as to the validity of the contract, the plan decides what is the extent of the estate sold; and this is so although the particulars given and taken as being particulars of what is comprised in the plan erroneously contained particulars which were not contained in the plan.

Such erroneous misstatements may afford the buyer good ground for a reduction of the contract, but in the absence of any action for this purpose he cannot found on the misrepresentation with the object of obtaining an estate larger than that delineated on the plan.

So held, reversing the decision of the Second Division of the Court of Session.

APPEAL from an interlocutor of the Second Division of the Court of Session, Scotland. (1)

This action was a dispute as to the extent of the land comprised in a shooting estate in Morayshire known by the name of the Dallas estate, which was bought from the appellant, Sir William Gordon Gordon-Cumming, of Altyre and Gordonstown, by the respondent and pursuer, Mr. James Hamilton Houldsworth, of Coltness, Lanark, on a contract of sale which both parties admitted to be a valid and binding contract. The appellant alleged that he sold "the estate of Dallas" according to a certain plan; while the respondent alleged that he bought the whole Dallas estate according to the appellant's registered title deeds, which would give from 1200 to 1500 acres more than was given by the plan. The Lord Ordinary (Lord Mackenzie) gave judgment on February 25, 1909, in favour of the appellant, but the Second Division on June 24, 1909, recalled his decision, ordering the appellant to grant to the respondent a conveyance which was, as stated above, in excess of the shooting estate of

(1) (1909) S. C. 1198.

H. L. (Sc.) Dallas. The further facts and evidence are sufficiently dealt with in the opinion of their Lordships.

1910

GORDON-
CUMMING

v.
HOULDS-
WORTH.

March 1, 3, 4. *Alexander Ure, L.A.*, and *John G. Spens* (both of the Scottish Bar), for the appellant. The question is, was the estate of Dallas purchased as shewn on the plan 46 or as described in the title deeds of the appellant? The respondent's summons concludes for a conveyance to him of "all and whole the lands and barony of Dallas," setting out in detail as in the title deeds thereof the lands and others included within the barony. The identity of the barony is not the same as the plan 46. The appellant contends that he made no contract to sell to the respondent the lands and barony of Dallas, but that what he did agree to convey was the shooting estate of Dallas, extending to about 15,000 acres, retaining the barony. Plan 46 was the only plan of the estate the purchaser's agent had before him on inspection of the estate. The appellant proposed to sell an estate of 15,000 acres, and the plan 46 shewed the boundaries of such an estate. But the respondent asked for a conveyance of an estate which was between 1200 and 1500 acres more, alleging that when an estate is sold under a general name the name designates the estate as described in the title deeds in the Register of Sasines. The respondent's claim must be limited to two things, an estate of about 15,000 acres, and an estate according to the boundaries set out in plan 46. These boundaries are not the same as the line of the barony of Dallas on the west side, where the estate marches with another estate, namely, Altyre, held by the appellant. Where the barony marches with estates held by others than the appellant, the boundary is well defined and is coincident with the shooting estate and plan 46. There was nothing in the evidence to support the case of the respondent. In fact the respondent's summons gives twelve descriptions of lands which cannot now be identified, and it is impossible from the description in the title deeds to formulate an accurate conveyance of what is claimed by the respondent. In 1698 the barony of Gordons-town was established, and it comprehended subjects lying in Nova Scotia as well as Dallas, so what the respondent is

really asking for is a conveyance of the barony of Gordonstown on his purchase of "the estate of Dallas." As regards the rentals of Auchness and Succoth, which were erroneously included in the particulars, there may be a question for adjustment, but it was not raised in these proceedings, and has no bearing on the question What was the estate sold? The judgment of the Second Division ought to be reversed, as the evidence shews there was a consensus ad idem that the "estate of Dallas" intended to be sold and bought was as delineated on the plan 46.

Scott Dickson, D.F., and Burn Murdoch (both of the Scottish Bar), for the respondent. There is no dispute as to the conclusion of the contract. But the respondent claims lands described in the registered deeds of the estate. When the appellant disentailed the Dallas estate in 1886 he acquired the Dallas estate, and that was the estate which he sold to the respondent. As between parties selling and purchasing an estate the first thing to consider is what is the seller's title; and a buyer is entitled by Scottish law to receive a disposition in terms of the seller's titles to the full extent of the lands held under the registered titles. The effect of plans in a contract of this kind is discussed in *North British Railway v. Tod* (1) and *Heriot's Hospital v. Gibson* (2), and it was there laid down with great emphasis that a written contract cannot be varied by parol evidence. The appellant contends that he is entitled to alter the written contract of sale by reference to plan 46. But the written communications did not refer to this plan, and by the law of Scotland it was incompetent to modify the contract by reference to the plan. If a plan is to be introduced into the sale of an estate there must be an express statement in writing that that is the intention. Here the plan was no part of the written contract and could not be taken to designate what was sold. The respondent is entitled to a conveyance of Dallas, and the appellant is bound in law to deliver a conveyance of all the land called Dallas belonging to him and described in the Register of Sasines. There is no difficulty in formulating a valid conveyance, as the respondent is content to

H. L. (Sc.)

1910

GORDON-
CUMMING
v.HOULDS-
WORTH.
—

(1) (1846) 5 Bell's App. 184.

(2) (1814) 2 Dow, 301.

H. L. (SC.) have the description of the lands in the deed of disentail.

1910

GORDON-
CUMMING

v.
HOULDS-
WORTH.

[They also cited *Inglis v. Buttery & Co.* (1)]

Alexander Ure, L.A., replied.

The House took time for consideration.

July 21. LORD LOREBURN L.C. My Lords, this is a dispute as to how much land was bought by Mr. Houldsworth on a contract of sale in December, 1907.

With unfeigned respect to the learned judges of the Second Division, I think the Lord Ordinary was right in his conclusion.

Both the parties come before your Lordships saying that they made a valid contract, and differ only as to the boundary of what was sold. Sir William Gordon-Cumming claims that he sold according to a plan. Mr. Houldsworth contends that he bought according to an instrument of disentail of December 31, 1886, which is a disentail of the "lands and barony of Dallas."

Now I am not in the least satisfied that the "estate of Dallas" is the same thing as "the lands and barony." On the contrary, there is no title specifically of the "estate," and the effect of treating it as equivalent to the lands and barony would be to substitute in the contract of sale a different description of the subject for that which the parties used. The proprietor owned not only Dallas, but the contiguous property of Altyre; and in 1887 he cut out an area which he then designed to sell, denominated it the "estate of Dallas," and had it delineated on a plan, No. 46 of process. I cannot see ground for assuming that a sale by name of the one subject is a sale by name of the other. This, however, does not affect the case from my point of view, for I hold that the sale was, in fact, on the plan. As I have the misfortune to differ from the Second Division, I must state the material facts on which my opinion proceeds.

For the purpose of selling in 1887, a small plan, thirty inches or thereabouts in length, had been prepared. There is no question that it exhibited intelligibly and quite accurately the boundaries and the area. It also contained a clear statement of the acreage, and confessedly states with sufficient precision the

dimensions of what Sir William wished to sell. It purports, on the face of it, to be a plan of the estate of Dallas, and in the negotiations throughout the area to be sold was called "the Dallas estate."

Not succeeding in 1887, Sir William again put this "Dallas estate" on the market in 1907, and Mr. Houldsworth proceeded to negotiate for it. Ultimately, in December, 1907, both parties agree in maintaining that a contract of sale was effected, though they differ as to what was the subject sold.

In my view these negotiations are crucial, and all that passed, either orally or in writing, is admissible in evidence to prove what was in fact the subject of sale; not to alter the contract, but to identify its subject.

These negotiations began in March and were suspended in the summer. At the end of the year they were renewed, and ended with a written offer of an option, and an acceptance thereof in December, 1907. All through, only one subject was the subject of negotiation, namely, the Dallas estate. Accordingly, anything which will identify that estate is equally important, whether it occurred at the commencement or at any other stage of the negotiations.

The material passages in this dealing are shortly as follows: Seller's agent furnishes a statement of the acreage of the Dallas estate as 15,303 acres, describing the kinds of land and the acreage of each kind, which agree with the plan. Buyer's agent says he will go to inspect and asks for a plan. He goes to inspect and is furnished with the plan, No. 46 of process, which I have already mentioned. Armed with this he goes over the ground and views it, only in a general way. He is also offered an examination of larger plans. If they had been examined they would have shewed some matter to provoke inquiry on the south-west boundary, but they also shewed a green line fixing the south-west boundary the same as plan 46. Buyer's agent did not, however, examine them, and worked upon plan 46 and on nothing else in the way of plans. He took plan 46 away with him, and subsequently wrote alluding to it as "the plan of the estate." How he could have thought that he was negotiating for anything but the estate delineated on plan 46 I do not

H. L. (Sc.)

1910

GORDON-
CUMMINGv.
HOULDS-
WORTH.Lord Loreburn
L.C.

H. L. (Sc.) understand, under the foregoing circumstances which represent
1910 his own evidence. If the evidence of the seller's agent is to be
GORDON- accepted, the identification is even more explicit. I regret that
CUMMING the Lord Ordinary has not told us which of the two accounts he
v. believed. But I take the buyer's evidence, and on that I am
HOULDS- convinced that the plan 46 represents the only estate which was
WORTH, the subject of negotiation from beginning to end.
Lord Loreburn
L.C.

One other circumstance must be mentioned, and was strongly relied upon by the Dean of Faculty on behalf of the buyer. In addition to plan 46 the buyer was furnished with the particulars of the estate, shewing acreage, names of tenants, and rentals. In these particulars there appear two distinct farms of Auchness and Succoth, with their acreage. These two farms lie partly within the area delineated in plan 46, but as to some 1200 or 1300 acres they lie outside that area. The error, of including their entire acreage, I think, arose from the extension of these farms, some thirty years ago, by taking in certain pieces of land formerly held in commonty. It is certain, however, that if they are to be included in the sale, their inclusion is absolutely inconsistent with the delineation of boundaries in plan 46, not in any small degree, but to a degree which would destroy the authority of that plan. It is also certain that, if they were so included, the inclusion would involve a complete departure from the area of 15,803 acres which appeared on that plan, and substitute a much larger area. Buyer's agent nowhere says that he bought on these particulars or noticed the discrepancy.

In the dealings between these parties I think the sale was on the plan; and the particulars in question were given and taken as being particulars of what the plan comprised, and erroneously contained particulars of what the plan did not comprise. Seller's agent says he pointed this out in substance to buyer's agent. Buyer's agent denies it, and I will assume he is right. In these circumstances the buyer might perhaps have renounced the contract on the ground of misrepresentation. As he does not renounce he cannot now found upon the discrepancy. He might be entitled to an allowance, but we were told that he did not desire to make any such point.

If your Lordships take this view, it concludes the case in

favour of the appellant. In any other view I should have felt great difficulty in holding that there was a consensus ad idem. It is not enough for the parties to agree in saying there was a concluded contract if there was none, and then to ask a judicial decision as to what the contract in fact was. That would be the same thing as asking us to make the bargain, whereas our sole function is to interpret it. My own view, however, is that there was a consensus, and that the interlocutor of the Lord Ordinary ought to be restored. I move your Lordships accordingly, and to award to the appellant his expenses here and below.

H. L. (Sc.)

1910

GORDON-
CUMMING
v.
HOULDS-
WORTH.

Lord Loreburn
L.C.

EARL OF HALSBURY. My Lords, I am entirely of the same opinion as the Lord Chancellor.

I have been very much puzzled to know what the dispute has been, since the account given by the defender is practically admitted by the pursuer and the witnesses he has called to support his case. Both parties have insisted on there being a concluded contract between them. This is what is said by Sir William Gordon-Cumming: "In 1907 I again determined to sell the estate. By this time Mr. M'Laren was my factor. I gave him instructions to place the estate in the hands of an agent. I gave him No. 46 as the plan of the estate. He had authority to sell upon no other plan. The estate of Dallas as shewn on No. 46 is the estate which I was prepared and am prepared to convey to Mr. Houldsworth." And there really is very little room for doubt when one reads the account given on the other side. Mr. Logan says: "He" (Mr. M'Laren) "handed me No. 46 or a copy of it. (Q.) Was this very plan recovered from you after the present litigation commenced? (A.) I know that this plan or a copy of it was got from me after the litigation began. I observe that that plan bears to be a plan of the estate of Dallas. I noticed that at the time. (Q.) Do you observe that the plan you have in your hand has the boundaries of the estate clearly defined? (A.) No, I would not say clearly defined boundaries. (Q.) Does it not shew clearly defined boundaries of the estate coloured pink? (A.) Yes, in so far as clearly defined boundaries can be shewn on such a plan as this—on a small scale. So far as a plan

H. L. (Sc.) can shew it, apparently the boundaries are clearly defined on that plan. I daresay I observed that the estate of Dallas as shewn upon this plan is said to have a total extent of 15,303 acres. I observed, therefore, that it corresponded substantially with the description given in Mr. Dowell's letter of 7th March, which said it was about 15,000."

1910
GORDON-
CUMMING
Esq.
HOULDS-
WORTH.
Earl of
Halsbury.

The fallacy which prevailed in the Courts to upset the extremely plain and accurate judgment of the Lord Ordinary is completely answered by my noble and learned friend Lord Kinnear, whose judgment, about to be delivered, I have had an opportunity of reading, and who points out that the argument which prevailed in the Second Division appears to rest upon some supposed doctrine of law, that "when an estate is sold under a general name, that name is held to designate the estate as described in the title deeds, all land in Scotland being held under titles recorded in the Register of Sasines, which is open to the public." But I entirely agree with my noble and learned friend that the meaning of a descriptive name in a particular contract cannot be determined by a fixed rule of law without regard to the facts of the case. No authority is quoted for any such rule, while my noble and learned friend gives his own high authority for saying that he knows of no authority either in principle or practice for the supposed rule.

My Lords, it seems to me that the reasoning fails because it assumes the question in debate,—that the estate was sold under the general name,—whereas the Lord Ordinary finds in terms "The estate as shewn in this plan was what was being sold; that the plan was handed to Mr. Logan at the first interview, was referred to by him throughout the negotiations, and was recovered from him in the course of the present proceedings. The remarkable thing is that apparently Mr. Logan never informed Mr. Dowell, or Messrs. Hagart & Burn Murdoch, the pursuer's agents, that this plan had been given him."

I certainly understand that in this passage the Lord Ordinary intends to find, and does find, as a fact that the estate was sold on this plan, and if so the definite thing was by this plan sufficiently ascertained. I could have understood a question

arising if there had been a dispute as to whether the two parties were ever at one, but both parties insist on a concluded bargain, and what it was, I think, is not in doubt.

I agree with the motion the Lord Chancellor has proposed.

H. L. (Sc.)

1910

GORDON-

CUMMING

v.

HOULDS-

WORTH.

LORD KINNEAR. My Lords, I agree with the motion proposed by the Lord Chancellor. There is no question before us as to the validity of the contract nor as to the identity of the greater part of the estate of over 15,000 acres to which the contract relates. The only point in dispute is whether a certain parcel of land extending, I think, to about 1300 acres is part of the estate so bought and sold. This appears to me to be a question as to the identification of the subject-matter of an admitted contract, or in other words it is a question of fact to be determined by evidence. But I have found it necessary to consider in the first place the respondent's argument that any appeal to extraneous evidence for the purpose of identification is excluded by the legal effect of the contract itself. His contention is that inasmuch as the parties had agreed, the one to purchase and the other to sell lands described generally and without specification of boundaries as "the estate of Dallas," the seller is bound in law to perform his part of the contract by delivering a conveyance of all the land called Dallas belonging to him, and so described in the feudal title by which he held it at the date of the sale; and, with a certain qualification which is not material to the question in hand, the Court below has given effect to this contention by the judgment under appeal.

The argument which prevailed with the Second Division appears to rest upon a supposed doctrine of law which is stated thus by one of the learned judges: "When an estate is sold under a general name, that name is held to designate the estate as described in the title deeds, all land in Scotland being held under titles recorded in the Register of Sasines, which is open to the public." But, with great respect, the meaning of a descriptive name in a particular contract cannot be determined by a fixed rule of law without regard to the facts of the case; and I know of no authority in principle or practice for the rule which has been so laid down. The Register of Sasines enables a

H. L. (Sc.)
 1910
 GORDON-
 CUMMING
 v.
 HOULDS-
 WORTH.
 Lord Kinnear.

purchaser to assure himself, if so be, that his seller is in a position to give him a valid title to an unencumbered estate. But there is no presumption of fact or of law that the purchaser has examined the records for the purpose of ascertaining boundaries; and if he did so, he would in general obtain but little information. The title deeds of an estate like that with which we are dealing do not, as a rule, define the subject in such a way that it can be identified without the help of extrinsic evidence. A grant or conveyance of the lands, or of the lands and barony of a certain name, or of so many merk lands of a certain name, is a perfectly valid title without any detailed description whatever. This creates no practical difficulty in determining rights of property, for the right depends not on the title alone, but on possession following upon and by virtue of the title. But the facts of possession do not appear on the records. The buyer, therefore, in this case followed a very natural and usual course when he made his bargain upon such information as he thought sufficient, reserving his consultation of the Register of Sasines until he should have acquired right to call upon the seller to exhibit the title and "the usual searches" in performance of a completed contract.

I agree with the respondent's counsel that a contract to sell the lands contained in a certain title is perfectly possible, and would give the purchaser right to everything which the seller and his predecessors had in fact possessed under that title. I should be disposed to concede further that, if an estate is sold under a general name, without reservation or restriction expressed in the contract, or capable of being proved by competent evidence, the reasonable inference is that what is intended is the estate so named which the seller holds under a valid title. And, if it be assumed that the contract covers the whole estate, the buyer would be entitled to a disposition according to the description contained in the existing titles, because, *ex hypothesi*, the intention of the contract is to transfer to the disponent everything to which the disponent had right. But, if there be any question whether the subject sold is less or more than the whole estate possessed, that cannot be solved by the title, unless the contract has been made with express reference to

the title. The mere coincidence of names proves nothing, because names are not used in the ordinary transactions of business with exact reference to title deeds; and the local use of estate names may vary indefinitely as boundaries may shift from time to time.

When lands have been held for any considerable period under the same title (and the lands in question have been so held since 1781) it will frequently be found that boundaries have been changed for convenience of management, or for the accommodation of neighbours, without any corresponding change being made in the titles; and the altered estate may still, for all ordinary purposes, pass under the old name. It is evident that this is all the more likely to happen when two contiguous properties are held under different titles by the same owner, who may observe the boundaries or disregard them, as he finds most convenient for the management of his estates. Accordingly it is pointed out in the treatises which are recognized as the best guides to modern conveyancing, the lectures of Professor Menzies and of Professor Montgomerie Bell, that it is the duty of the conveyancer in framing a disposition upon a sale not to take for granted that he is to follow the exact terms of the description of the existing title, but to make full inquiry into the facts in order that he may be enabled to describe correctly the subject intended to be disposed; and, as an illustration of the necessity for caution which he inculcates, Professor Bell refers to the case of *Inglis v. Mansfield* (1), which was decided in this House—a very important case on a different branch of law, but in which the admitted purpose of a contract was entirely defeated by the negligent assumption of a conveyancer that the lands of Hillside, mentioned in the contract, must be identical with the lands of Hillside as described in the titles of the owner. There are many other cases in the books which go to illustrate the same point, but one is enough.

It is manifest, therefore, that if a question arises as to the description to be inserted in a disposition, the first thing to be settled is what is the exact subject sold; and that is to be determined, not by the existing titles, but by the contract of sale,

(1) (1835) 3 Cl. & F. 362.

H. L. (Sc.)

1910

GORDON-
CUMMING

v.
HOULDS-
WORTH.

Lord Kinnear.

H. L. (Sc.)

1910

GORDON-
CUMMING

v.

HOULDS-
WORTH.

Lord Kinnear.

interpreted, as every document whatsoever must, more or less, be interpreted, by reference to the surrounding circumstances.

The evidence which has been adduced for this purpose is said to be inadmissible; but for the reasons which have been given by the Lord Chancellor and by the noble and learned Earl I am very clearly of opinion that it was perfectly relevant and was rightly admitted by the Lord Ordinary. I concede that the letters specified in the summons make a complete and final contract, and it follows that in accordance with the well-known rule of law the terms therein expressed cannot be contradicted, altered, or added to by oral evidence. But it is just as well settled law that evidence may be given not to modify but to apply the contract by identifying any person or thing mentioned in it which requires identification; and I see no difference in this respect between the admissibility of a map or plan of the estate and that of any other item of evidence, so long as the plan is not used for the purpose of importing additional or different terms, but only to prove the external facts to which the contract relates.

I do not think it necessary to recapitulate the evidence, because it is very fully and correctly stated by the Lord Ordinary, and I agree with everything that has been said about it by the two noble and learned Lords who have preceded me. The material fact is that beyond all question Sir William Gordon-Cumming intended to sell the estate of Dallas as delineated on the plan No. 46 of process, and that that intention was made clear to the buyer. It was indispensable to take some such method for defining the subject of sale, because the recent possession, however it may have been cleared by the evidence in this case, was ambiguous. Sir William himself believed that the line laid down on the plan was the true line of boundary between Dallas and Altyre. I am not satisfied, to say the least, that he was right in this. But the possibility of his being mistaken made it all the more necessary that he should define with precision the line of boundary between the land he offered for sale and the land he intended to retain. He could not do so better than by delineating the area and boundaries of the estate to be sold upon a plan. He accordingly authorized his

agent to sell Dallas as laid down upon the plan No. 46. This was the only estate which his agent, Mr. M'Laren, had authority to sell; and the agent carried out his instructions with exactness. This estate therefore, and no other definite property, was offered for sale to the buyer; and the buyer's agent had no other description put before him and no other materials for defining the estate he was buying except the plan which had been furnished to him for that purpose. If the letters of December, 1907, are read with reference to the facts and circumstances which were, or ought to have been, present at the time to the minds of the agents who wrote them, they constitute, to my mind, a perfectly distinct and unqualified offer and acceptance of the estate of Dallas as delineated on the plan No. 46.

But there are two points in the argument of the respondent's counsel which may require consideration. In the first place it is said that the rental furnished to the buyers includes the farms of Auchness and Succoth, which to a great extent lie outside the area shewn on the plan. This was a mistake which I think has not been very satisfactorily cleared up. But the rental was not put before the buyer's agent for the purpose of identifying the subject sold, and he does not allege that he relied upon it as evidence that ground outside the area of the plan was included in the sale; the rental, therefore, is not relevant to the point in issue. When the subject of sale has been made specific by measurement and boundaries it may invalidate the contract but it cannot enlarge its scope to shew that a rental was exhibited to the purchaser in excess of what could be in fact obtained.

I agree with the Lord Ordinary that it is unnecessary to inquire what remedy would have been open to the purchaser if he had desired to rescind the contract on the ground of a misrepresentation. He affirms the contract and brings this action to enforce it; and it must be affirmed, if at all, according to its actual terms.

The second point is that the buyer relied upon the title and not upon the plan. If it had been proved that he believed he was buying according to a certain description in a title deed,

H. L. (Sc.)

1910

GORDON-
CUMMING

v.

HOULDS-
WORTH.

Lord Kinnear.

H. L. (SC.)
1910
GORDON-
CUMMING
v.
HOULDS-
WORTH.
Lord Kinnear.

while the seller believed he was selling according to the plan, there would have been very strong ground for maintaining that there was no contract. But the buyer's agent never saw the titles till after the contract was completed, and had no kind of description before him except that contained in the plan. His evidence shews only that he took for granted, contrary to the fact, that there must be a description in the title, and assumed that this would be the governing description if any question should arise as to extent of boundaries. But this was a mere mistake, which, since it was not due to any representation by the other party, has no effect in law. On consideration of the whole evidence I am therefore of opinion that there was a valid and binding contract between the parties; and as regards its effect, I think the Lord Ordinary's conclusion is perfectly right when he says, "There remains no doubt in my mind that what Sir William Gordon-Cumming intended to sell was the estate of Dallas shewn on the plan No. 46, and nothing else. I am unable to see how Mr. Logan could have been under the belief that he was purchasing for his constituent anything else."

If this be the meaning of the contract, the next question is whether the respondent is entitled to a conveyance of the estate or lands of Dallas in terms of the conclusions of his summons; and it follows from what I have already said that he is not so entitled, if Dallas includes, or if there be reasonable ground for holding that it may include, any part of the disputed land outside the boundary laid down on the plan. The appellant does not take quite so simple a view of the matter. But I am by no means able to accept the Lord Advocate's argument on this part of the case. It must be remembered that the title which the learned counsel criticized in such detail is the appellant's own title to his estate of Dallas, and that it is put forward by him in performance of his contract for the sale of that estate. The first obligation which a contract for the sale of land lays upon the seller is to exhibit a valid title or progress of titles in his own person to the subject sold; and if he fails to do so he is in breach of contract. But the only title which the appellant has to exhibit is a deed of entail of 1781, along with which he

produces an instrument of disentail not as his title to land (for an instrument of disentail is not a title to land), but in order to shew that he has acquired power to sell the entailed estate. Being thus relieved of the fetters, he puts forward the deed of entail to prove his own right in the estate which he has sold, and so to establish his title to give a valid disposition to his purchaser. It is out of the question, therefore, that he should be allowed to contradict his own case by denying that the estate of Dallas described in the deed of entail corresponds in the main with the estate of Dallas mentioned in the contract.

The difference between the phraseology of the deed and the phraseology of the contract is to my mind of no significance whatever. "Estate" is a word of common language and may very naturally be used with its ordinary meaning in an informal writing. But it is not the usual or appropriate term for a feudal conveyance, and to find that what is called an estate of a certain name in a correspondence between men of business is called "the lands" or "the lands and barony" of the same name in the title deeds is exactly what any one would expect who is familiar with the practice of conveyancers. The addition of the word barony makes no difference, because that only expresses a legal fact which carries with it certain conveyancing advantages but adds nothing to the area of the physical subject. Nor is it of importance to say that certain of the holdings which are asserted in the title to be included in the barony have not been identified. It is of no consequence whether they are identified or not, because a conveyance of the barony as such, without any enumeration of particulars, will carry all the particular lands within it. But the conclusive answer to all criticism of the two documents, taken apart from the evidence, is that the deed of entail is put forward by the seller and accepted by the buyer as a sufficient title to support a valid conveyance of the subject sold. It is nevertheless open to the appellant to shew that while the deed of entail is a valid title to all the land possessed by himself and his predecessors under the name of Dallas, he has kept back from the sale a certain portion of the land so possessed. That point is perfectly open

H. L. (Sc.)

1910

GORDON-
CUMMING

v.

HOULDS-
WORTH.

Lord Kinnear.

H. L. (SC.)

1910

GORDON-
CUMMING

v.

HOULDS-
WORTH.

Lord Kinnear.

to him, and in my judgment it is the only point open to him upon the title. If that be so, he is clearly entitled to frame a new description in order to convey to his purchaser the subject sold and nothing more. On the other hand, if the subject sold coincides at all points with the subjects carried by the deed of entail, the respondent will be entitled, according to the ordinary rule of practice, to a conveyance in terms of the existing title.

On an examination of the plan it appears that the estate sold does in fact coincide with the estate possessed by the appellant under his titles at all points except just where the estate of Dallas is said to be bounded by other property belonging to the appellant himself, because at every other part of the boundary the estate of Dallas as shewn upon the plan is represented as being bounded by other properties belonging to different owners ; and therefore it is only at the south-western boundary, where the ground actually in dispute is situated, that the appellant is in a position to say "I have reserved from the sale property belonging to myself which I did not intend to sell at all." The respondent accordingly states his objection to the plan as being that it contains only part of the estate of Dallas. The answer, to my mind, is conclusive. That is exactly the reason why you cannot have a conveyance of the whole estate of Dallas, because you have bought on the plan and must take the estate so defined.

But then the question is complicated by the argument for the appellant, that the parcels of land in dispute are not part of the estate or of the lands and barony of Dallas, but are in fact part of his other estate of Altyre. I think this point difficult to maintain (to put it no higher) in face of the very forcible reasoning of the learned judges ; but if it were clearly made out the appellant would have no defence to this action. The summons concludes for a disposition of the lands and barony of Dallas and nothing else, and if the disputed farms are outside the limits of Dallas they will not be carried by a conveyance in those terms. It is only because they would or might be carried by a conveyance of the lands of Dallas without restriction that the appellant has an interest to vary the

description. The true answer to the pursuer's demand, H. L. (Sc.)
 therefore, is not that the disputed ground is not part of Dallas, 1910
 but that whether it is part of Dallas or not it is effectually GORDON-
 excluded from the contract of sale. I think this is a sufficient CUMMING
 answer, because when the appellant offered his estate of Dallas r.
 for sale he defined exactly what he meant, by production of the HOULDS-
 plan No. 46, and whether the area so defined coincides or not WORTH.
 with the possession he and his predecessors have had under Lord Kinnear.
 their existing titles makes no difference to the contract. If the
 land sold falls short of that so possessed, it is obvious that
 he cannot be required to convey the whole; and if there be
 any reasonable ground for question as to the fact, he is not
 bound to concede a title to his purchaser which is avowedly
 demanded on the ground that it will cover parcels of land
 which he did not sell. On the whole matter, therefore, I think
 that the Lord Ordinary's judgment is right and ought to be
 restored.

I only add that I express no opinion as to the sufficiency of
 the title actually offered by the appellant. If any question arises
 as to its terms, it is not one to be settled in this House. But
 when the question of right has been determined by the judgment
 proposed by the noble and learned Lord on the woolsack, the
 parties will have no difficulty in adjusting the proper terms of
 conveyance.

LORD SHAW OF DUNFERMLINE. My Lords, before I come to
 the crucial question in this case, which is whether a contract of
 sale of the estate of Dallas was under the letters produced made
 according to a particular plan or was not so made, I think it
 important, and indeed necessary, to deal with certain other
 portions of the argument presented at your Lordships' Bar by
 the learned Lord Advocate.

It is not disputed that a sale in fee simple of the estate of
 Dallas has become possible by the execution of an instru-
 ment of disentail by Sir William Gordon-Cumming, Baronet, of
 the lands and barony of Dallas, dated December 31, 1886, and
 registered June 18, 1888. This is a deed in which the grantor
 is described as "Sir William Gordon Gordon-Cumming of Altyre

H. L. (Sc.)
 1910
 ~~~~~  
 GORDON-  
 CUMMING  
 v.  
 HOULDS-  
 WORTH.

Lord Shaw of  
 Dunfermline.

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and Gordonstown, Baronet, heir of entail in possession of the lands and others after-mentioned." The description of the lands and others is a reproduction of that contained in the titles, e.g., the entail of 1781. These lands are "All and whole the lands and barony of Dallas comprehending," and then follows the naming of particular towns, hills, loans, lochs, cairns, &c. Language, verbose and not unusual, descriptive of pertinents follows. And the "lands, barony, and others above written" are stated to lie "within the parish of Dallas and sheriffdom of Elgin and Forres." An analysis, my Lords, of a somewhat detailed character was made of this description in order to shew (which was not indeed disputed) that it did not contain elements sufficiently intelligible at the present day from which boundaries might be made up. And a conclusion was apparently desired that a sale under these titles would have been a sale of something so indeterminate that one was consequently driven to the plan without which no definite contract could be said to have been made.

My Lords, I can only say with reference to that argument, but I do so as clearly and emphatically as I can, that I see no ground or reason whatever for supposing or suggesting that a sale of the lands and barony of Dallas, although no plan thereof had been referred to or been in existence, would not have been a perfectly good sale according to the law of Scotland, on the well-known principle that when a man stands infeft as owner of certain subjects he sells the same, there being nothing said to the contrary, as they stand in him and, to use the familiar and appropriate expression, on the faith of the records. The situation of Scottish landed property as subject of transfer would indeed be perilous if it were allowed to a seller holding under a recorded title to analyse it for the purpose of shewing that from it it was impossible to ascertain what was the subject which he had sold. Accordingly, I do not doubt that in the present case, suppose no plan had been seen by the parties or referred to in the transaction, the transaction itself would have been perfectly good, and could have been worked out upon the elementary principles applicable to Scottish land. These are (1.) that the transaction proceeds upon the faith of the records; (2.) that in

the case of indefiniteness in boundary, that indefiniteness is cleared up by the state of possession of the property; and (3.) where such clearing up requires to be judicially made, disputed marches are settled by the judge ordinary of the bounds.

My Lords, I should be sorry to think that any doubt whatever was thrown upon these principles. The system of registration of title in Scotland, which was substantially perfected in the seventeenth century, beginning particularly with the Act 1617, c. 16, was the recognition of the principle that the transfer of land in Scotland was not a private transaction merely, but a matter of public concern. For nearly 300 years the system of registration of titles has prevailed, and has been found of value not only for national purposes, but for the purposes of the publication of all transactions in and in regard to land. Registration, the faith of the records, and the use and adaptation of these to all the purposes of the transmission, burdening, &c., of heritable property in Scotland, all these things are not only at the basis of Scottish conveyancing, but they are not usually, to say the least, accompanied by the indefiniteness argued for, but on the contrary by practical certainty. As already stated, a sale on the faith of the records is a regular and ordinary matter of course in regard to transactions affecting land in Scotland. I am constrained, therefore, to reject the whole of the argument founded upon the criticism by the appellant's counsel of the appellant's own title.

As to the use in this transaction of the term "estate of Dallas," I think that that term and the term "lands and barony of Dallas" were substantially convertible. I am not surprised that when the agents for the seller were asked to forward the titles to what had been sold, namely, the estate of Dallas, they forwarded the titles, and along with them the instrument of disentail of the lands and barony. It is fairly plain that the lands of Dallas and the estate of Dallas were the same, and to denominate the latter a barony effects, and in Scotland would suggest, no alteration of their boundaries or limitation or increase of their extent. And again, premising that the correspondence and negotiations had been without reference to a plan, I do

H. L. (Sc.)

1910

GORDON-  
CUMMING  
c.HOULDS-  
WORTH.Lord Shaw of  
Dunfermline.



H. L. (Sc.) not doubt that by the sale of the estate of Dallas by its proprietor no Court of law in Scotland could have come to a conclusion that it was not strictly identical with the lands and barony.

1910  
GORDON-  
CUMMING  
v.  
HOULDS-  
WORTH.

Lord Shaw of  
Dunfermline.

Finally, I attach no importance, nor do I think any of your Lordships do, to the estate being called a sporting estate. This merely meant that the estate of Dallas had the attractions of sport, perhaps in a particular degree, but it is quite consistent with that, as is the case here, that there should on the same estate be a large agricultural rental, much larger indeed than the revenue in the shape of sporting rent.

I hold, accordingly, for the reasons given, that the contract to sell the estate of Dallas with no reference to a plan or plans, and with no reservation or restriction expressed in the contract, would have been, according to well-established principles, a sale on the faith of the records, and although these should not have disclosed definite boundaries, yet notwithstanding the sale would have been of what under familiar practice was a perfectly ascertainable *unum quid*.

It is in the fullest recognition of these principles, which have proved in Scotland of so great convenience and utility, that I reach the correspondence in this case. And with regard to it I may say with your Lordships that it must be treated as a whole. So treated, it is, I have come to think, pretty clear that this particular transaction was not a sale merely on the faith of the records. Rentals containing statements of tenancies with exact measurements were furnished. A plan was asked for on behalf of the intending purchaser, and I think it is proved that at one interview between the representatives of the parties a large plan was exhibited and was not fully examined; whereas a small plan was taken by Mr. Logan, who acted for the buyer, and was kept in his possession for many months. I cannot say, however, that it is proved that Mr. Logan, although he had the plan upon the ground during his inspection, ever went the length of the boundaries or indeed within a mile or two of this particular boundary, or used the plan in the sense of checking those boundaries on the ground.

My Lords, the rentals have been the subject, to my mind, of

very considerable difficulty in this case. They were undoubtedly inspected by the representatives of the parties, and they were checked in some minor details. They contain the names of two farms—"Auchness" and "Succoth"—and the acreage of these farms extends beyond the boundaries as delineated on the plan, and does so to the extent of many hundreds of acres. But the peculiarity of this case is that while that acreage extends beyond the boundaries on the plan, it does not, it is admitted on behalf of the respondent, extend up to the limits of the barony. The learned Dean of Faculty conceded that this was so, but treated the concession as *ex gratia*,—in the sense that he was willing to go to the bounds of these farms and no further. No doubt that was a wise attitude; but, my Lords, it largely destroys the value of the rentals as indicating boundaries, when it is found that they do not fortify, but, on the contrary, contradict, the boundaries of the barony, as these would have been adjudicated had the transaction been on the faith of the records. On the whole, therefore, I fear that the argument for the latter view is not strengthened but rather weakened by the production of the rentals.

The final question—and it does not appear so easy to me as to some of your Lordships—is accordingly, Was this a special transaction upon plan, or a transaction, very ordinary in the case of large landed estates in Scotland, of a sale under a common name and under the recorded title? Taking it that the boundaries of the estate, in the sense of the barony, were one thing, and that the boundaries per the plan were another, I hold it to be fairly clear that the seller by himself and his agent meant to sell by the plan referred to in the correspondence and used on the ground. Had the case, my Lords, of the purchaser been that, although this was so, he meant to buy on the faith of the records, and that, accordingly, there was no consensus *ad idem*, I should have had, upon the whole, little difficulty in agreeing with him. But that is not the position taken up. The position taken up is that there was consensus *ad idem*; and, in short, he is as plain that not only did he, but his opponent, conclude the transaction upon the faith of the records, and not on the plan, as his opponent is in maintaining that the transaction was concluded

H. L. (Sc.)

1910

GORDON-  
CUMMING

v.

HOULDS-  
WORTH.Lord Shaw of  
Dunfermline.

H. L. (Sc.) 1910  
 GORDON-  
 CUMMING  
 v.  
 HOULDS-  
 WORTH  
 Lord Shaw of  
 Dunfermline.

upon the plan and not upon the records. Possession of the property has been taken over, and the Court is confronted with allegations mutually destructive and only agreeing in this, that a bargain was made. This being so, the question of the extent and boundaries of the subject sold falls to be ascertained from a perusal of the correspondence and the evidence and is a question of fact. It is carrying matters too far, when a plan has been one of the documents exchanged between the parties, to say that it shall be excluded from the bargain by what it is argued is a superior doctrine as to the extent of the estate per the titles. For the plan which is produced is undoubtedly a plan which, although containing the bulk of the estate per the titles, does, at or near the disputed boundary, exclude therefrom a considerable tract of land.

In *Keith v. Smyth* (1) a reference to a plan was made in the titles of certain heritable subjects. On that Lord President Inglis observes: "There being no boundaries expressed in the dispositions, I apprehend it is clear that the plans are referred to for the purpose of shewing the boundaries, and, in the second place, for the purpose of shewing the extent or measurement of the ground."

My Lords, this, which is true with regard to executed deeds of conveyance, is also similarly true with regard to a contract of sale of heritable property. The parties, as I have said, each maintain that they were both agreed, and the question is whether they agreed upon a sale per plan or per titles. My Lords, we have had the advantage of a most careful treatment of that subject by Lord Mackenzie, who heard the witnesses. He has come to the conclusion that the subject of sale was per plan. Notwithstanding the opinion of the learned judges of the Second Division, which I have perused with much respect and care, I cannot see my way to differ from the conclusion arrived at by the Lord Ordinary. I therefore agree with your Lordships; but I think it right, in view of the arguments to which I have alluded, to make it clear that I do so without derogating from those familiar principles and practice which accord with and tend to

(1) (1884) 12 R. 66, 74.

make up the highly-prized system of registration of titles in Scotland. H. L. (Sc.)

1910

*Ordered that the interlocutors appealed from be reversed; that the interlocutor of the Lord Ordinary dated February 25, 1909, be restored; and that the cause be remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment: And it is further ordered that the respondent do pay to the appellant the costs of the action in the Court of Session and also the costs incurred by him in respect of this appeal.*

GORDON-  
CUMMING  
v.  
HOULDS-  
WORTH.  
—

*Lords' Journals, July 21, 1910.*

Agents for appellant: *Grahames, Currey & Spens, for John C. Brodie & Sons, W. S., Edinburgh.*

Agents for respondent: *Trinder, Capron & Co., for Hagart & Burn Murdoch, W. S., Edinburgh.*



## [PRIVY COUNCIL.]

J. C.\*  
 1910  
 April 28;  
 July 15.

REID-NEWFOUNDLAND COMPANY . . . DEFENDANTS;  
 AND  
 ANGLO-AMERICAN TELEGRAPH COMPANY PLAINTIFFS.  
 ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

*Contract—Construction—Exclusive Right of Entry on Appellants' Land for specified Purposes.*

Where by mutual agreement between the appellant railway company and the respondent telegraph company the latter was exclusively entitled to erect and work lines on the property of the former for the purposes of its own business and bound to furnish for the use of the former a special wire for the purposes of the railway as it existed at the date of the contract:—

*Held*, reversing the judgment of the Court below, that the respondents' exclusive right for the purposes of its own business did not exclude the railway company from erecting and working telegraph lines on its own property for the purposes of its railway business.

APPEAL from a judgment of the Full Bench of the Supreme Court (May 1, 1909) restraining the appellants from maintaining and operating a telegraph line along a certain part of their railway on the ground that under an agreement of August 11, 1888, the respondents had the exclusive right to use the railway track in question for that purpose. The appellants were further ordered by the said judgment to remove the said telegraph line and to account to the respondents for the messages which had been sent over it.

The question decided was as to the true construction and effect of the said agreement, which is sufficiently 'set out in their Lordships' judgment.

In 1907 the appellants erected a telegraph wire of their own on their own lands and along the line of their railway, proposing to use it exclusively for the purposes of the railway. The Supreme Court unanimously rejected their contention that under their agreement they were not excluded from so doing.

\* *Present*: LORD MACNAGHTEN, LORD COLLINS, LORD SHAW OF DUNFERMLINE, and SIR ARTHUR WILSON.

*Danckwerts, K.C.*, and *R. E. Moore*, for the appellants, contended that the agreement contained nothing which expressly excluded the appellants from erecting and working the telegraphs complained of. They had not entered into any covenant to that effect. The railway company remained in full possession of their lands, and the exclusive right of entry for purposes named conferred on the respondents was exclusive of all third parties, not of the appellants, whose rights over their own land in the absence of covenant could not be cut down by implication. Reference was made to *United States Direct Cable Co. v. Anglo-American Telegraph Co.* (1)

*Sir R. Finlay, K.C.*, and *Rowlatt*, for the respondents, contended that the respondents' exclusive right under the agreement extended to prohibit the appellants from erecting wires for their own use in contravention of the respondents' exclusive rights conferred upon them for the purposes of their business.

*Danckwerts, K.C.*, in reply.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal from a judgment of the Full Bench of the Supreme Court of Newfoundland, delivered on May 1, 1909. The precise form of the judgment it seems unnecessary to examine. It is enough to say that in substance it restrained the appellant company (the railway company) from erecting, maintaining, or operating a line of telegraph upon their own land, for the purposes of the efficient working of their own railway, with the usual incidents which naturally follow from such an injunction.

The case was conducted on both sides before their Lordships on the footing that the result must depend upon the construction of an agreement, dated August 11, 1888, made between the Newfoundland Railway Company of the first part, one Evans, receiver and manager of that company, of the second part, and the now respondents of the third part.

A former case between the same parties as those to the present appeal came before this Board a few years ago. The question in

J. C.  
1910  
REID-  
NEWFOUND-  
LAND  
COMPANY  
v.  
ANGLO-  
AMERICAN  
TELEGRAPH  
COMPANY.

1910  
July 15.

J. C.

1910

REID-

NEWFOUND-

LAND

COMPANY

v.

ANGLO-  
AMERICAN  
TELEGRAPH

COMPANY.

that case was with reference to the same agreement as that now in controversy.

The material provisions of that contract for the present purpose are as follows :—

By the most important clause for the present purpose it was said : “The railway company with the assent of the receiver and manager testified by his execution of these presents agree, first, that the telegraph company shall have for a term of twenty-seven and a half years from the first day of November A.D. one thousand eight hundred and eighty-eight the exclusive right at all reasonable times for the purposes hereinafter mentioned, to enter upon the lands hereinafter mentioned, and to build, erect, maintain, and operate upon and along the lands forming the roadways of the southern division of the railway company’s railway between St. John’s and Harbour Grace and between Harbour Grace and Carbonear, as many lines of telegraph for the purposes of the business of the telegraph company as the telegraph company may deem necessary, and a special wire for the use of the railway company, their servants and agents, and successors and assigns for use in and about the management, operation, and control of the said railway, and all purposes connected with or incidental to such management, operation, and control, with all necessary and useful posts, wires, and other outfits so as the same shall be so put, placed, and erected, as not in any way to interfere with or obstruct the management and control by the railway company or the said receiver and manager or their or his agents and servants of the said lands and of the said railway, or with the operation or traffic thereof, or with any of the buildings, erections, or other property of the railway company now on or which may hereafter be placed upon the said lands.”

By a subsequent clause the railway company agreed “not to pass or transmit any commercial messages over the said special wire, except for the benefit and account of the telegraph company.”

And by a further clause the telegraph company agreed “with all reasonable despatch after the execution of this agreement and at the sole cost and charge of the telegraph company to build and erect with good and suitable materials, and

fully equip and fit with all necessary instruments, materials, matters and things, and for the period of twenty-seven and a half years from the 1st day of November one thousand eight hundred and eighty-eight (*force majeure* [*sic*] excepted) continuously and efficiently maintain in good working order and operate at least two lines of telegraph wire from the railway station at Harbour Grace to the railway station at Carbonear, one of such wires to be for the use and purposes of the telegraph company, the other to be a wire (hereinbefore called the 'special wire') for the special and exclusive use of the railway company and the receiver and manager, their and his agents, servants and workmen, and to be at all times open and ready for their and his use, and to be so constructed and maintained as to afford to them and him constant communication between each of the railway stations between St. John's and Harbour Grace and Harbour Grace and Carbonear."

It will be noticed that the contract under consideration was one between a railway company seeking its profits by serving the public as railway managers, and concerned with telegraphs so far as necessary for the safety of the railway and the efficiency of its working, and on the other hand a telegraph company seeking its profits by supplying telegraphic conveniences to the public; and in the principal clause of those cited this distinction is clearly kept in view. It allows the telegraph company to erect and work lines for the purposes of its own business, and requires that company to furnish for the use of the railway company a special wire for railway purposes.

The question that arose in the former case was as to the extent of the right of the railway company to use the special wire provided for its use, whether that use was limited to the purposes of the railway as it existed in 1888, the date of the contract, or whether it extended to the purposes of the railway as afterwards developed. What was held in that case by this Board, affirming the view of the Court in the Colony, was that the right of using the wire was limited to the purposes of the railway as it existed at the date of the contract.

That decision, however inevitable, appears to have been felt by the railway company as placing it in a difficulty, and that difficulty it proposed to meet in a way which has given rise to

J. C.  
1910  
REID-  
NEWFOUND-  
LAND  
COMPANY  
v.  
ANGLO-  
AMERICAN  
TELEGRAPH  
COMPANY.



J. C.  
1910  
—  
REID-  
NEWFOUND-  
LAND  
COMPANY  
v.  
ANGLO-  
AMERICAN  
TELEGRAPH  
COMPANY.  
—

the present litigation. The railway company proposed to lay telegraph lines of their own along their own lands for the purposes of the working of their railway. This is what was objected to by the plaintiffs in the present suit, and that objection prevailed in the Court of the Colony.

Their Lordships have to say whether that objection is well founded, and the solution of that question depends almost entirely upon the language of the contract of 1888.

The argument on behalf of the telegraph company (an argument which was accepted by the Colonial Court) was largely based upon the use of the words "exclusive right" in the clause cited. It is necessary, therefore, to see what the "exclusive right" referred to is. It is not an "exclusive right" of entry; for the railway company remains in possession, and must do so in order to work its railway, which it is under an obligation to do. The exclusive right granted is to enter for the purpose of erecting, maintaining, and operating telegraph lines for the business of the telegraph company.

In their Lordships' opinion this exclusive privilege of erecting and working telegraph lines for the business of the telegraph company does not exclude the right of the railway company to erect and work telegraph lines on its own property for the purposes of its railway business. Their Lordships are unable to agree with the view taken of this case by the learned judges in the Colony. Their Lordships are of opinion that the railway company is not shewn to have exceeded its rights. They will humbly advise His Majesty that the judgment and decree of the Colonial Court should be set aside, and the suit dismissed with costs in the Court below.

The respondents will pay the costs of this appeal.

Solicitors for appellants : *Freshfields.*

Solicitors for respondents : *Bircham & Co.*

## [PRIVY COUNCIL.]

ALFRED NELSON LAUGHTON . . . . PLAINTIFF ;

J. C.\*

AND

1910

COMMISSIONERS OF PORT ERIN . . . . DEFENDANTS.

June 15 ;  
July 15.ON APPEAL FROM HIS MAJESTY'S HIGH COURT OF JUSTICE  
OF THE ISLE OF MAN (STAFF OF GOVERNMENT DIVISION).*Specific Performance—Agreement to purchase Land—Manx Local Government  
Act, 1886, s. 286.*

Specific performance of a contract by the respondent commissioners to purchase the land in suit from the appellant decreed; their contentions—(1.) that one of their number was through his father “indirectly concerned” in the purchase within the meaning of Manx Local Government Act, 1886, s. 286, in a manner which conflicted with his duty; (2.) that the appellant had intimated his intention not to seek it—being overruled as not being established by the evidence.

APPEAL from an order of the above Court (November 29, 1907) affirming an order of the Clerk of the Rolls (April 24, 1907) which dismissed the appellant's suit for specific performance of an agreement dated March 26, 1904, for purchase by the respondents of certain lands at Port Erin, in the Isle of Man, and for damages for delay.

Both Courts refused specific performance, but on different grounds which are stated in the judgment of their Lordships.

*Cave, K.C., J. G. Wood, and C. Hughes Games*, for the appellant, contended that these judgments were erroneous, and that the agreement was valid, duly executed, and binding on the respondents. The appellant was always ready and willing to perform it, and there was no evidence of repudiation. Reference was made to *Royou v. Paul*. (1)

*Frank Russell, K.C., and Cozens-Hardy*, for the respondents, contended that the circumstances under which the agreement

\* *Present* : LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and SIR ARTHUR WILSON.

(1) (1858) 28 L. J. (Ch.) 555.

J. C.  
1910  
LAUGHTON  
v.  
PORT ERIN  
COMMISSIONERS.

was executed rendered it inequitable that specific performance should be decreed. It involved a breach of trust by the respondent Clague, who acted as agent for his father, an owner of adjoining property, and who through his father was interested in the purchase and the contemplated improvements of the land bought, which would increase the value of the adjoining property. His interest accordingly conflicted with his duty of protecting the commissioners from an improvident purchase. See Local Government Act, 1886, ss. 151, 231, and 286; *Boston v. Pigott*(1); and *Melliss v. Shirley Local Board*(2), a decision under s. 193 of the Act there cited. The appellant had shewn by his letters which were in evidence that he had elected not to be bound by the agreement, and the respondents having acquiesced therein, both parties were debarred from obtaining specific performance.

*Cave, K.C.*, in reply.

1910  
July 15.

The judgment of their Lordships was delivered by  
LORD MACNAGHTEN. The action which has given rise to this appeal was brought to enforce specific performance of a contract for the sale of land at Port Erin, in the Isle of Man, for the sum of 2250*l*.

The contract is dated March 26, 1904. The appellant, who was the vendor, was plaintiff. The purchasers, who were defendants in the action, are the Commissioners of Port Erin. The land was bought to be used as a pleasure ground or place of public resort or recreation. The commissioners have power, with the approval of the Tynwald Court, to buy land for that purpose. The requisite sanction was given on May 29, 1906, and thereupon the contract became absolute. It was a condition of the contract that the purchase should be completed within one month after approval by the Tynwald Court.

In the Court of first instance his Honour the Clerk of the Rolls dismissed the action, but without costs, and he ordered the plaintiff to return the deposit of 100*l*. paid on the execution of the contract.

On appeal to the Staff of Government Division of the High

(1) (1874) L. R. 10 Q. B. 86.

(2) (1885) 16 Q. B. D. 446.

Court, the judgment of the Court below was reversed so far as regards the return of the deposit. Otherwise the appeal was dismissed, and again the dismissal was without costs. From that decision the present appeal is brought.

Both Courts in the island refused costs to the commissioners on account of their conduct. "Plaintiff," said the Clerk of the Rolls, "has been put to a great deal of annoyance, trouble, and delay by the defendants, and, under all the circumstances, he has been hardly treated throughout."

Mr. Frank Russell, who appeared for the respondents, said everything that could be said on their behalf. But it was impossible either to justify their conduct in trying to shuffle out of a solemn bargain or to suggest any plausible ground of defence to the plaintiff's claim.

In the argument before this Board two points were presented on behalf of the respondents. Both were argued with much ingenuity. One had found favour with the Clerk of the Rolls, but was rejected in the High Court. The other was adopted by the learned Deemsters in the Court of Appeal.

His Honour the Clerk of the Rolls came to the conclusion that the Court ought not to enforce the contract because one of the commissioners present when the agreement was approved had, as he thought, an interest in the success of the proposed improvement scheme. His interest, such as it was, was this. He was his father's eldest son. His father was a neighbouring landowner, and so much interested in having the land laid out as a pleasure ground that, in response to an appeal by the commissioners, he subscribed 500*l.*, and agreed besides to contribute some land to widen an adjoining road. The father was in failing health at the time, and the son acted for him in his negotiations with the commissioners. On that ground it was said that the contract of sale under the seal of the commissioners was void *ab initio*, and the learned Clerk of the Rolls so held. There was no complaint that the price was extravagant: it was proved to be below the market value of the land. It was not contended that the commissioner whose conduct is so gravely impeached acted otherwise than openly and *bona fide*. It was not suggested that he was pecuniarily or directly interested in

J. C.  
1910  
LAUGHTON  
v.  
PORT ERIN  
COMMISSIONERS.



J. C.  
1910  
LAUGHTON  
v.  
PORT ERIN  
COMMISSIONERS.

the sale. But it was said that he was indirectly "concerned," and it was argued that the word "concerned," which occurs in the Manx Local Government Act, 1886, s. 286, ought to have a very wide meaning. It is not surprising that an argument so far-fetched was rejected by the Manx Court of Appeal and made little impression on the Tynwald Court, where it seems to have been put forward at the instance of some of the present Commissioners of Port Erin with the view of inducing the Court to withhold its sanction to the contract.

The other point commended itself to the Court of Appeal. It was this. It was said that the appellant had disintitiled himself to the specific performance because under some provocation he had written two indiscreet letters to the commissioners, which after the action was brought they construed as a declaration that, whatever he meant to do, he did not mean to ask for specific performance.

On April 18, 1905, the appellant wrote to the commissioners a letter in which he expressed himself as follows: "I would also add that after the expiration of the period named" [? for completion after approval] "by the Tynwald Court I shall not consider myself bound by my agreement with your Board, but shall dispose of the lots, separately or otherwise, as I may think fit." Of this letter, beyond giving a bare acknowledgment, the commissioners took no notice.

The other letter on which the commissioners now rely was dated June 2, 1906. It contained the following passage:—"The commissioners have—most vexatiously—delayed necessary procedure for upwards of two years, whereby I have lost the interest upon the 2250*l.* for that period. I therefore wish them clearly to understand that I shall not consent to extend the time for settlement, payment of the purchase-money, and the laying out of the grounds for one day after the expiration of the said month."

Now, the letter of June 2, 1906, taken by itself, so far from indicating an intention to determine or avoid the contract, seems to insist on its strict performance. But then it was ingeniously argued that it must be read with the letter of April 18, 1905, and that if the two letters, divided in point of time by an interval of more than twelve months, are taken together, you can spell

out a declaration on the part of the appellant that he did not intend to seek specific performance. After such a declaration, it was said the Court was bound to refuse specific performance. In support of that view a case before Kindersley V.-C. was cited as a direct authority on the point. It was the case of *Royou v. Paul*. (1) That case has no doubt a superficial resemblance to the present, but it has no real bearing upon it. It was a claim for specific performance. On November 5, 1856, the vendor's solicitors wrote to inform the purchaser's solicitor that unless he proceeded to complete the purchase within five days they should resell the premises. Some months afterwards the vendor brought a suit for specific performance. The bill was dismissed with costs. But it was not dismissed because the plaintiff had disentitled himself to specific performance, but because the purchaser had duly determined the contract. Replying to the vendor's letter of November 5 on the very next day the purchaser gave notice that unless his requisitions were complied with within a week he would commence an action to recover his deposit. The plaintiff's solicitors, who had more than once refused to comply with requisitions which the Court held to be reasonable and proper, persisted in their refusal. On November 17 the purchaser brought an action to recover his deposit. The vendor, after some delay, met this move by a bill for specific performance. The real question was not whether the plaintiff had put himself out of Court by his conduct, but whether the contract was duly determined by the defendant's notice. The Vice-Chancellor held that the notice, though short, was sufficient under the circumstances, because, to use his words, "the vendor, from the time of his writing the letter of the 5th of November, seems to have said 'I don't mean to ask you for specific performance.'"

Their Lordships are of opinion that the order under appeal and the judgment of the Clerk of the Rolls must be discharged with costs, to be paid by the respondents to the appellant, and that the respondents ought to be ordered specifically to perform the agreement of March 26, 1904. The action must be remitted to the High Court of Justice of the Isle of Man, Chancery Division, to enforce the contract.

(1) 28 L. J. (Ch.) 555.

J. C.

1910

LAUGHTON  
v.  
PORT ERIN  
COMMISSIONERS.

J. C.            The deposit must be taken as part payment of the purchase-money.

1910  
LAUGHTON       Their Lordships will therefore humbly advise His Majesty accordingly.

PORT ERIN  
COMMIS-  
SIONERS.

The respondents will pay the costs of the appeal.

Their Lordships cannot part with the case without expressing their regret that a public body should have considered it right to take a course which must subject the ratepayers to a heavy burden by resisting a just demand which no private individual in a similar case would have thought of repudiating.

Solicitors for appellant: *Tarry, Sherlock & King.*

Solicitors for respondents: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.\*       NATAL BANK, LIMITED . . . . . APPELLANTS;

1910

AND

June 16, 17; HENDRICK THEODOR ROOD AND OTHERS . RESPONDENTS.  
July 15.

ON APPEAL FROM THE SUPREME COURT OF THE TRANSVAAL.

*Roman-Dutch Law—Mutual Will—Community of Property between Spouses—Community of Property not continued after Death—Boedelhouderschap—Liability of surviving Spouse as Executor to Deceased—Institution of Survivor as sole and universal Heir—Construction—Children's Rights of Inheritance.*

According to Roman-Dutch law as it prevails in the Transvaal, in the case of a mutual will by spouses with community of property the dispositions of each spouse are treated as applicable to his or her half of the joint property.

*Denysen v. Mostert*, (1872) L. R. 4 P. C. 236, followed.

Where the surviving spouse is under the terms of the mutual will executor and administrator of the estate of the deceased, charged with the duty of holding the separate estate as part of the joint estate until the majority or marriage of the children, *held*, that in the absence of express direction in the will the community of property known as

\* *Present*: LORD ATKINSON, LORD GORELL, LORD SHAW OF DUNFERMLINE, and SIR ARTHUR WILSON.

boedelhouderschap is not continued between the children and the surviving spouse. Accordingly the rights of those entitled to the estate of the deceased must be adjusted by the familiar rules of accounting applicable to executory estates, and any profits made by the executor out of transactions with the joint estate form part of the trust estate and must be distributed as such according to the terms of the will.

*Held*, further, that by the established practice in South Africa as well as by judicial interpretation the effect of thus instituting in such a mutual will the surviving spouse as sole and universal heir or heiress is that the survivor and children are to be treated as joint heirs, the survivor being entitled to possession during the children's minority in order to support and educate them, and thereafter to be entitled to his own half of the joint estate together with a share in the estate of the deceased equal to that of a child, paying over to the children their portions as ascertained at the date of the death of the first deceased on an honest valuation.

*Oosthuizen v. Moeke*, (1866) 1 Roscoe, 230, approved.

APPEAL by special leave from a judgment of the Supreme Court (March 29, 1909) in favour of the respondents.

The action was brought to obtain an order to expunge certain proofs of debt made by the respondents and admitted by the presiding officer in the insolvent estate of their father, Karel Rood. The plaintiff bank was a creditor thereof for the amount of 38,870*l.* 14*s.* 3*d.*, secured by covering bonds over its assets.

Karel Rood had on February 10, 1875, married Anna M. Buhrmann, and by ante-nuptial contract of that date it was provided that there should be community of property between the spouses, but that certain property of the wife should not be alienated or incumbered without her co-operation, that the wife should have certain other rights, and that at the death of either of the spouses such property should first of all be taken out of the joint estate unincumbered.

In August, 1877, the insolvent and his wife executed a mutual will, which is sufficiently set out in their Lordships' judgment, whereby the testators respectively appointed each other executor and executrix of their will, administrator and administratrix of their estate and effects, and guardian of their surviving minor children. They appointed each other reciprocally sole and universal heir of all property (movable and immovable), but bound the survivor to maintain and educate the children of the

J. C.

1910

NATAL  
BANK,  
LIMITED  
v.  
ROOD.



J. C.  
1910  
NATAL  
BANK,  
LIMITED  
v.  
ROOD.

marriage until majority or marriage, when the parents' share was to be paid to each of them. The testament also provided against interference by others, and that the survivor should not be bound to hand over to the Orphan Master or other official any statement or inventory of the estate.

The wife acquired during the marriage both movable and immovable property, and such property was during the subsistence of the marriage under the control of her husband, the said immovable property being registered in his name. She died on March 1, 1894, leaving her husband and her eight children, the respondents.

After her death Karel Rood did not make an inventory of the assets of her estate or of the joint estate, nor did he have the assets valued. He continued in possession of the whole estate (including the property brought in by his late wife) and the proceeds thereof. One farm, Begin-der-Lyn (specially dealt with by the will), he transferred to the respondents in 1906. In September, 1906, he filed with the Master of the Supreme Court a liquidation and distribution account of the estate of the deceased spouse and of the joint estate, based on the actual realized value of the assets of the estate. The joint estate was solvent at the wife's death.

In May, 1895, Karel Rood disposed of thirty-three gold and mineral farms belonging to the joint estate (in which, however, certain persons owned shares), and he paid out to those persons their shares in the proceeds. He duly paid and liquidated the liabilities of the joint estate. The account of the wife's estate and of the joint estate as filed shewed in all 49,907*l.* for distribution amongst the wife's heirs, a ninth share being awarded to the husband and to each of the eight children, in accordance with the interpretation in *Oosthuizen v. Moeke* (1) applied to a form of mutual will adopted in this case and in common use in South Africa before and since the date of that decision.

On March 18, 1907, Karel Rood, who was solvent at the time of filing the above accounts, surrendered his estate as insolvent. The appellants proved for 38,443*l.* secured by covering bonds over the assets of the insolvent estate; the respondents for their

(1) 1 Roscoe, 230.

shares of the balance of the said account as filed. This balance they claimed was secured by a tacit hypothec over the property of the insolvent, dated as from the death of their mother in priority over all other special or general mortgages and pledges of a later date.

The appellants' objections to the respondents' proofs of debt were overruled by the presiding officer, and they accordingly applied to the Supreme Court to expunge those proofs. The Supreme Court allowed them, but reduced the amounts in accordance with certain admitted errors in the liquidation account as filed.

The judgment was delivered by Innes C.J., and it was held upon the construction of the ante-nuptial contract and the evidence that the joint estate was solvent at the date of the death of the testatrix, and that she had separate property over and above her half of the net value of the joint estate of which she could dispose by will. With regard to the mutual will he held that under it the children took not "legitimate" portions only, but filial portions as joint heirs, and that Karel Rood took only a child's portion. He further held that for the purpose of ascertaining the children's shares the estate should be valued at the actual realized value obtained for the same in 1895.

With regard to the shares taken by the children the material portion of the judgment construing the mutual will is as follows:—

"We were asked to place upon these words the same construction as by a dictum—for it was only a dictum—the Supreme Court of the Cape Colony, in *Wium's Case* (1), placed upon somewhat similar words, and to hold that their effect was to allow to the children, not their filial portions, but their legitimate portions only. The will which was considered in *Wium's Case* (1) also instituted the survivor as sole heir of the first dying, and directed the survivor to maintain the children during their minority, 'when'—that is at majority—'to each of them shall be paid over for or in place of father's or mother's portion such a sum of money as the survivor shall conscientiously, and according to the condition of the estate, find to belong to them.' The

(1) (1844) 2 Menzies, 431.

J. C.  
1910  
NATAL  
BANK,  
LIMITED  
v.  
ROOD.

J. C.  
1910  
NATAL  
BANK,  
LIMITED  
v.  
ROOD.

Supreme Court indicated that the true construction of the will was that the children were only entitled to their legitimate portions; but I do not think that construction is consistent with the later decision in *Oosthuizen v. Moeke*. (1) The will there was in terms practically identical with the one which came before the Court in *Wium's Case* (2), and it was held that the children shared equally with the survivor in the estate of the first dying—in other words, that the survivor had a half of the estate plus a child's portion. That was a decision pronounced by Watermeyer J., a judge distinguished for his knowledge of Roman-Dutch law, and his acquaintance with Colonial circumstances and Colonial practice; and it has always been followed at the Cape. We were not referred to any other South African decision inconsistent with *Moeke's Case* (1), and I am satisfied that, as this is a very common form of will among the country population in South Africa, the decision in *Moeke's Case* (1) has virtually settled the law in regard to the interpretation of such will, and certainly we should follow it in the Transvaal. Moreover, the present will is stronger in favour of the children than either of the wills considered in the two cases to which I have referred. In those wills the survivor was ordered, in place or instead of the father's or mother's portion, to pay out to the children when they attained majority, such shares as, in accordance with the condition of the estate, and according to conscience, they thought the children were entitled to. Here the survivor is directed to pay to the children at majority their actual paternal or maternal portions—that is, not their legitimate, but their filial portions. I am therefore of opinion that the meaning of the present will is that the survivor should retain his half of the joint estate and a child's portion of his wife's half, and that therefore each child would be entitled to one-ninth of what the testatrix was entitled to bequeath; subject to the further provision that the survivor was to enjoy the usufruct of the children's portions during their minority in order to support and educate them."

As respects the question whether the shares to which they were entitled had reference to the estate as it stood at the date

(1) 1 Roscoe, 230.

(2) 2 Menzies, 431.

of their mother's death or at the date when Karel Rood realized them, in other words whether the increment to the estate effected by the administrator belonged to himself exclusively or the children were entitled to share in it, the material portion of the judgment is as follows:—

“It appears to me that two considerations must be borne in mind. The one is that the children's rights to their inheritances vested at their mother's death, and they were just as much heirs of their mother as their father was. The other is that the father was executor of the estate, and the administrator and guardian of his children, and he therefore stood in a position of trust towards the heirs, the usufruct of whose inheritances he was only entitled to enjoy during their minority. The creditors in existence at Mrs. Rood's death have been paid, and we are not now asked to decide or discuss any question of preference as between the children and the claims of subsequent creditors. The matter is entirely one between the father and the children, and upon general principles I should say that because the children's inheritances were vested, as well as their father's, and because the law will not allow a trustee to enrich himself at the expense of those whose interests are committed to his charge, the children could claim to share in the proceeds which the property actually realized, if it should be for their benefit to do so.”

He accordingly held that the children were entitled to share in the realized value of the assets, including the said increment. He added: “We heard a good deal during the argument about the law in regard to *boedelhouderschap*, but to my mind this is not a case of *boedelhouderschap*. In certain parts of the Netherlands, community between a surviving spouse and his children was allowed to be continued, even without any express direction to that effect in the will, and this was called a *boedelhouderschap*. But this was the result either of local custom well established, or of local statute. In the absence of such custom or enactment, Voet, in the passage cited by Mr. Gregorowski, clearly states that the continuation of this community could not be allowed under the general law of Holland, because it was at variance with the common law of

J. C.

1910

NATAL  
BANK,  
LIMITEDv.  
ROOD.  
—



J. C.  
1910  
NATAL  
BANK,  
LIMITED  
v.  
ROOD.

partnership—as most undoubtedly it is. The passage quoted ad pandectas (24, 3, 30) had reference only to a case where such community was recognized, not by the general law of Holland, but by a statute of Antwerp; and that passage therefore does not apply. Nor does it in express terms deal with the question as to the date at which the valuation of the assets left in the estate of the first dying is to be made. Now in this Colony, save where the will so directs, as in *Cloete's Case* (1), there is, so far as I am aware, no principle of boedelhouderschap allowed either by statute or by practice. And it appears to me that our whole scheme of the administration of estates of this kind is against that idea. However that may be, this is not a case of boedelhouderschap. In my opinion, therefore, the liquidation account before the Court was rightly framed, in so far as it proceeded upon a calculation of the realized value of the assets which belonged to the two spouses.”

*Buckmaster, K.C.*, and *Mackarness*, for the appellants, contended that the order of the Supreme Court was wrong and that at any rate there ought to be a further considerable reduction in the proofs allowed. The practical question was whether and to what extent the rights of the respondents were shewn to be paramount to those of the appellants, who claimed in respect of debts created by Karel Rood. That depended upon two issues—(1.) what shares came to the children under the testamentary dispositions of their mother contained in the mutual will; (2.) to what extent had those shares incurred liability for the insolvent's debts. With regard to the first issue it was contended that upon the true construction of the mutual will the testatrix had appointed her husband in plain and unambiguous terms her sole and universal heir. She had not appointed the respondents joint heirs with him. Consequently the only portion of her estate claimable by each child was the “legitimate portion” secured to him or her by the then law of the Transvaal as to a child not for good cause disinherited: see *Van der Keessel's Select Theses*, on Grotius, p. 101, bk. 2, part 18, s. 8, cl. 305; *In re Wium*. (2) The decision in *Oosthuizen*

(1) (1888) 5 S. C. C. 59.

(2) 2 Menzies, 431.

v. *Moeke* (1) was that of a single judge and ought not to have been implicitly followed. Moreover, the value of the respondents' shares in their mother's estate ought not to have been calculated upon the basis of the amount realized by the sale of the thirty-three farms in 1895. Either the value of the assets at the date of the death of the testatrix ought to have been taken, when the property in question was worth considerably less, being before the discovery of precious minerals in or near them; or on the true construction of the will the date at which the testatrix intended the distributable assets to be valued was the date or dates at which she had directed each child's portion to be paid. And the inheritance of the children ought not to have been increased by any of the profits made by Karel Rood on properties which admittedly formed no part of the joint estate. He ought in making them to have been regarded as acting on his own behalf and for his own estate and not in a fiduciary or executorial capacity. Since those profits did not belong to the joint estate, they were not distributable amongst the children.

With regard to the second issue it was contended that the effect of the mutual will was that community of property continued to exist between the surviving spouse and the children till their majority or marriage. Although it must be admitted that there was no *boedelhouderschap* unless so directed by the will, here such a direction was plainly implied in the appointment of the survivor as executor, administrator, and guardian of the minor children. The evidence shewed also that that community had been acquiesced in by the children who had attained majority. It resulted that both majors and minors were liable at least to the extent of their inheritances for the debts of the joint estate. On a correct estimate of the assets of the joint estate there are none available to pay those inheritances, and the respondents' proofs of debts in the insolvency proceedings ought to be expunged. Reference was made to *Cloete v. Cloete's Trustees* (2); *Oosthuysen v. Oosthuysen* (3); Grotius' Introduction to Dutch Jurisprudence, bk. 2, c. 13,

J. C.

1910

NATAL  
BANK,  
LIMITED  
v.  
ROOD.  
—

(1) 1 Roscoe, 230.

(2) 5 S. C. C. 59, 66.

(3) (1868) Buchanan's Rep., vol. 1, pp. 51, 71.

J. C.  
1910  
NATAL  
BANK,  
LIMITED  
v.  
ROOD.

pars. 1 and 2; Maasdorp's Institutes of Cape Law, Of the Boedelhouder or surviving possessor, bk. 2, c. 13, s. 3; Van der Keessel (ed. 1868), bk. 2, c. 13, s. 1; Van Leeuwen (Kotze), bk. 4, c. 23, s. 9 and note; Van Der Linden, Institutes of Holland, p. 38, bk. 1, c. 5, s. 4, on Boedelhouderschap.

*Danckwerts, K.C., R. Gregorowski, and W. R. Bisschop*, for the respondents, contended that the judgment of the Supreme Court was right. As regards the claim by the appellants that the profits made by Karel Rood in dealing with the trust estate were for his own benefit and passed to his creditors in preference to the beneficiaries, see *Robinson v. Pett*. (1) Roman-Dutch law is to the same effect, that a trustee cannot enrich himself to the detriment of the trust estate. As to the position of children and their rights to legitimate portions of the inheritance of their parents, see Grotius, 2, 18, 8; 2, 11, 13; 2, 18, 8, 9; and *Brink v. Voigt*. (2)

With regard to the construction of the mutual will, the decision in *Oosthuizen v. Moeke* (3) correctly determines its interpretation, which is in accordance with the practice in the Colony as applicable to a very common form of will which has prevailed for a century amongst the population. It was submitted that it was too late to disturb a construction under which this custom had grown up and on the faith of which this particular form of will was so generally adopted. Although the survivor is nominated as sole and universal heir, in truth and according to a well-understood practice he is not so to the extent at least of being able to reduce the interests of the children to their legitimate portions, that is, to the amount that they are entitled to by law as in the case of intestacy and cannot be deprived of by the will of the parent. The will must be read as if the survivor and the children were instituted as joint heirs. Reference was made to *Wannenburg v. Le Roux*. (4)

With regard to the contention of the appellants that there was a continuance of the community of property as between the survivor and the children so as to render the latter liable to the

(1) (1734) 2 White & Tudor, 7th ed., pp. 606, 618. head-note being at 2 Menzies, 394.

(3) 1 Roscoe, 230.

(2) (1831) 1 Menzies, 537, the

(4) (1895) 12 S. C. R. 383.

extent of their inheritances for losses incurred by the survivor, it was answered as follows. It was submitted that the rules regarding boedelhouderschap which were recognized in certain towns and districts of the Dutch republic do not form part of the Roman-Dutch law as the common law of South Africa. Also that the mutual will properly interpreted does not establish such continuation, but allows or directs that the community should end with the death of either spouse. Reference was made to Grotius' Introduction, 2, 13, 1, and Grøenewegen's note to this paragraph; Voetad Pand., 24, 3, 28; Holland, Consultations, vol. 1, cons. 105, vol. 2, cons. 272, 273, and 274; Tennant's Notary Manual (5th ed.), p. 219; Wessel's History of Roman-Dutch Law, p. 466; Maasdorp's Institutes of Cape Law, 2nd ed., vol. 1, p. 93; *Cloete v. Cloete's Trustees*. (1) Moreover, the fact that the usufruct of the children's portions was given to the husband during their minority or until marriage shewed that the intention of the testatrix was that those portions should be separated from the joint estate and separately enjoyed by the children. They were all of them minors at their mother's death and were entitled to and possessed a tacit hypothec over the assets of the estates affected by the will. Their shares should be calculated on the realized value of the assets of the estates belonging to their mother which were disposed of by her will; or in the alternative on the basis of the proceeds of those estates when actually realized. And the failure to file an inventory throws on the survivor the burden of proving the extent of his own proprietary right in the assets in his possession.

The following authorities were also cited:—*Baker v. White* (2); *Hill v. East and West India Dock* (3); *De Smidt v. Burton* (4); *Brink v. Voigt* (5); *Oosthuysen v. Oosthuysen* (6); *Widow Cleeweek v. Bergh* (7); *In re Wium* (8); Maasdorp's Institutes, 2nd ed., vol. 1, pp. 204, 205; *Smith v. Executors of Sayers* (9);

J. C.

1910

NATAL  
BANK,  
LIMITED  
v.  
ROOD.

(1) 5 S. C. C. 59.

(2) (1875) L. R. 20 Eq. 166.

(3) (1884) 9 App. Cas. 457.

(4) (1841) 1 Menzies, 222, and 2 Menzies, 401.

(5) 1 Menzies, 537, and 2 Menzies, 394.

(6) Buchanan's Rep., pp. 51, 52, 54.

(7) (1832) 2 Menzies, 396.

(8) 2 Menzies, 431.

(9) (1880) Foord's Rep. 66.



J. C. *Erasmus v. Erasmus' Guardians and Executors* (1); *Atmore*  
 1910 *v. Chaddock.* (2)  
 NATAL *Buckmaster, K.C., in reply.*  
 BANK,  
 LIMITED  
*v.*  
 ROOD.  
 1910  
*July 15.*

The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a judgment of the Supreme Court of the Transvaal. The judgment was delivered on March 29, 1909, by Sir James Rose Innes C.J., and Sir William Smith J. concurred. The suit was brought by the appellant bank, who are creditors of the insolvent estate of Karel Rood. The respondents are the children of Karel Rood and his wife Anna Margaretha Buhrmann. These spouses were married in February, 1874, and by their ante-nuptial contract it was provided, *inter alia*, that there should be community of property between them.

In August, 1877, these spouses executed a mutual will, and certain clauses therein fall to be construed in this appeal.

Mrs. Rood died on March 1, 1894, survived by her husband and her eight children, the present respondents.

Under the mutual will the testators respectively appointed each other executor and executrix and also administrator or administratrix of their estate and effects and guardian of their children during minority. Upon his wife's death Karel Rood took out letters of administration as executor, but made no inventory of the estate of his late wife or of the joint estate and obtained no valuation. In the following year, 1895, Karel Rood realized the joint estate along with other properties over which he had obtained certain options as after mentioned, and the whole transaction resulted in a substantial profit.

Twelve years thereafter, namely 1907, Karel Rood, who had become insolvent, surrendered his estates. In the clearing up of the accounts relative to the joint estate of the spouses and any separate estate of Karel Rood, it is to the interest of the appellants as his creditors to have the corpus of his insolvent estate, in the first place, fully credited with all separate acquisitions by him which would increase the value of his estate available for distribution; in the second place, to put forward

(1) (1903) Transvaal L. R. 843.

(2) (1896) 13 S. C. R. 205.

such a construction of the mutual will as will give to him a large share of the succession in, inter alia, the joint estate; and, finally, to place, if possible to the debit of the joint estate rather than of his separate estate, all liabilities and debts incurred by the husband after the dissolution of the marriage, this depending on the argument that the community of interest and property was continued and prorogated after the wife's death. On the other hand, the separate attribution of profits to Karel Rood's estate instead of to the joint estate would lessen the amounts falling to the respondent children under the mutual will. And their interests would be further lessened if effect were given to the plea as to the large rights of succession in Karel Rood himself, or if the joint estate were charged with Rood's separate debts. It is out of this clashing of interests that the suit has arisen.

Various questions were raised in the course of it which were not put in issue at their Lordships' Bar; and certain adjustments of the accounts took place in the Court below with regard to which no separate issues were stated. Upon all these no observations need be made.

But three substantial questions of principle were fully argued, and according to the lines of their settlement the judgment of the Court below will be altered or maintained. In the treatment of these it should be premised (1.) that by an ante-nuptial contract of marriage, dated February 10, 1874, it was provided that the parties "have agreed that the said marriage shall be solemnized in lawful community of property as such community is laid down and regulated by law"; (2.) that the bulk of what is admitted to have been the joint estate was certain farms or portions of farms, over thirty in number, sold to the Lydenburg Estates Company, Limited, as after mentioned. Certain of these farms were held in undivided shares with other part owners.

With regard to the construction of a mutual will such as that of Mr. and Mrs. Rood, the general principles thereof will be found laid down by Sir Robert Collier in the case of *Denysen v. Mostert* (1), and there seems no reason to vary in the present

(1) L. R. 4 P. C. 236.

J. C.  
1910  
NATAL  
BANK,  
LIMITED  
v.  
ROOD.  
—

J. C.  
1910  
NATAL  
BANK,  
LIMITED  
v.  
ROOD.

case from the first of these principles, namely, that “such wills, notwithstanding their form, are to be read as separate wills, the dispositions of each spouse being treated as applicable to his or her half of the joint property.” It would appear to be a natural consequence that the estate of the predeceasing, being thus disposed of by what is construed to be in effect a separate will, should fall to be ascertained so that its distribution to the beneficiaries sharing thereunder should be capable of approximately accurate measure. It may be, as in the present case, that the surviving spouse, who is also appointed executor and administrator, may be charged with the duty of holding the separable estate as part of the joint estate until the majority or marriage of children, when the shares of what has fallen to them under the predeceasing’s will will fall to be paid over, but, in the opinion of their Lordships, such a state of affairs gives no ground for the argument that the community of property is continued after the dissolution of the marriage by death—continued to the effect of substantially making the children benefited by the will and entitled to their mother’s share the partners of their surviving father. It is plain that—were this to happen with the ordinary results—these might be serious, for the children’s share, instead of being either set aside or reserved and secured, might be depleted or disappear in the course of administrative and trading loss. The argument was hardly so high as this, but it was distinctly maintained that the present was a case of that guarded partnership or continuance of community of interest known as *boedelhouderschap*. Even under this, however, it would appear to be fairly clear from the authorities that there will not be community of profits and losses in the ordinary sense, but that “the half of everything which accrues to the estate after the death of the first dying, whether by inheritance or otherwise, goes to the children without their being liable, however, for any part of the loss which may accrue during the same period or their being in any way prejudiced by encumbrances effected or anything else done by the surviving parent”: *Maasdorp*, Introduction to Dutch Jurisprudence of Grotius, c. 13, s. 3. It might not accordingly affect the result though the suggestion that this is a case of *boedelhouderschap* were given effect to. But

upon that it is not necessary to express an opinion, for their Lordships see no reason to differ from the judgment of the Court below that the present is not a case of *boedelhouderschap*.

The present case indeed shews the serious risks that might result if effect were given to the broad argument that the community continued after the dissolution of Mr. and Mrs. Rood's marriage.

In the appellants' case it is submitted "that the true legal effect of the mutual will was to continue the community of property between the surviving spouse and the children of the marriage up to the date or dates when the said children respectively attained their majority or married, that such a continuation of the community had been acquiesced in by those of the children who had already become majors, and that during the continuation of the community both major and minor children were liable at least to the extent of their 'inheritances' for the debts of the joint estate."

Rood had gone on trading with the joint estate and had landed in insolvency, and apparently the argument is that the shares inherited by the children in their mother's half of the joint estate could have been wholly lost in consequence of the community in the joint estate being continued after the dissolution of the marriage, coupled with the fact that the administration of it was left in the hands of the father. Their Lordships see no justification for such an argument.

The learned Chief Justice remarks that "in this Colony, save where the will so directs, as in *Cloete's Case* (1), there is, so far as I am aware, no principle of *boedelhouderschap* allowed either by statute or by practice"; and he also observes that to his mind this is not a case of *boedelhouderschap*.

It seems fairly clear that, while the custom of continuation or prorogation of the community beyond the dissolution of the marriage appeared to have been permissible in certain towns or districts of Holland, the general law was clearly against it. Voet states the point in these words (24, 3, 28): "*Sed sine statuto aut consuetudine satis manifesta communionis hujus prorogatio, tanquam a jure communi societatis recedens, admittenda non est.*"

(1) 5 S. C. C. 59.

J. C.

1910

NATAL  
BANK,  
LIMITED  
v.  
ROOD.  
—



J. C.  
1910  
NATAL  
BANK,  
LIMITED  
v.  
ROOD.  
—

Had the mutual will in this case specifically prescribed that the community of interest should continue in the sense argued for, that of course would have formed the rule, but their Lordships do not so read the will, and when the learned Chief Justice remarks that, to his mind, this is not a case of *boedelhouderschap*, their Lordships find themselves in complete agreement. It appears to them to be further plain that a practice so specific and peculiar and so out of accord with the common consequences either on the one hand of partnership or on the other of administration of estates ought not lightly to be extended. The simple view appears to be also the sounder in the present case, namely, that Karel Rood was constituted by the mutual will executor and administrator of the joint estate, and that the rights therein, namely in one half thereof which belonged to his predeceasing wife, are to be adjusted on the familiar rules of accounting applicable to executory estates. The question then is simply what upon a fair reckoning was that half.

There is thus reached the second important branch of the case, and to understand this it is necessary to state in a word what was the transaction with regard to the realization of the property which took place. As already stated, the joint estate consisted mainly of over thirty farms, many of these held in undivided shares jointly with other part owners. Karel Rood was not only administrator of this joint estate, but he was in own right owner of one half of it, and in addition had a certain right of succession, which will be afterwards referred to, under his wife's will. In order to obtain a better realization of these farms, some of which appeared to have mining possibilities, he secured an option over the interests of certain joint owners in these farms and also over other adjoining properties, and having, so to speak, massed together these with the joint estate, he sold the whole at a large profit for 36,000*l.* in cash and 64,000*l.* in shares of the before-mentioned Lydenburg Estates Company, Limited. Out of the amounts received he paid out the part owners and the owners of the separate properties which he had acquired at fixed options. In all, a balance of over 78,000*l.* remained for distribution.

Up to this stage the transaction appears to have been not

only judicious and profitable, but to have proceeded upon accurate accounting. It is maintained, however, that what ought to be done with reference to the properties is this: The outside properties and the joint estate properties have been slumped together and the slump price ought to be apportioned relatively to the value which these properties bore to each other. Suppose accordingly, as a test figure, that the outside properties and the joint estate properties were half and half, the profit should be halved. One half would go to the joint estate, and the other half, not to the owners of the separate properties who have been paid that and no more which was fixed as the price at option, but into the estate of Karel Rood personally, the argument being that it was his device and his judicious administration in procuring the options and slumping the whole estates that brought about this profit.

Their Lordships do not doubt that the transaction was a piece of good business. So far as the options were concerned, however, Karel Rood had risked nothing. No separate capital of his had been embarked in the purchase of those properties, and it must not be forgotten that as administrator of the joint estate, apart from his being himself interested therein, his duty was to obtain the best possible price for what was committed to his charge. While that duty might not and would not have compelled him to enter into speculations with other properties for the purpose of procuring a slump transaction, yet if he has done so, and particularly if he has done so without having embarked any of his own private capital, there seems no good reason for withholding from the estate which he was administering the entire profit on the whole transaction after the options were satisfied. Karel Rood's responsibility in that respect was simply that of a trustee, and a trustee cannot be allowed to secure for himself a profit arising out of transactions with the estate committed to his charge. Such profits form part of the estate and fall to be distributed as such. The enrichment of a trustee at the expense of the estate or of the beneficiaries is contrary to the established principles of trust accounting. Further, in regard to the present transaction, there seems also no reason to doubt that it was the fact that Karel Rood was

J. C.

1910

NATAL  
BANK,  
LIMITED  
v.  
ROOD

J. C.  
1910  
NATAL  
BANK,  
LIMITED  
v.  
ROOD.

administering the joint estate that put him into the position of obtaining the options and carrying the slump transaction through. It would, in their Lordships' view, be a principle accompanied by great danger if, before an inventory was lodged, as was the case here, and before segregation, and while the whole estate was administered together, any administrator could be heard to say that he had acted cleverly and made a good deal, and therefore, seeing that he alone had secured those options which made a larger and better realizable estate, he was entitled to allocate all the profits apportionable to the option properties to himself. This is simply another way of saying that a trustee can enrich himself by pocketing a proportion of the speculating profits in an estate transaction.

The last question is one of undoubtedly great importance in the law of succession to estates in the Transvaal.

The mutual will contains the following clauses :—

“ The testators declare to nominate and appoint each other reciprocally as executor and executrix of this their testament, likewise administrator or administratrix of their estate and effects, as well as guardian of their surviving minor child or children, heir or heirs, as they do hereby nominate and appoint the survivor of them, with power of appointing agents in their place if they choose to do so.

“ Now, proceeding to the choice of heirs, the testators declare and appoint each other reciprocally, that is the first dying the survivor of them, as his or her sole and universal heir of all the property to be left by the first dying, movable as well as immovable, claims and credits, inheritances and legacies, nothing whatsoever excepted, to be entered upon and possessed for ever by the survivor of them as free and ‘ encumbered ’ (*sic*) property without gainsay of anybody whomsoever, but the survivor shall be bound and obliged to educate and maintain the child or children born or to be born of this marriage in an honourable and Christian-like manner till their ages of majority, marriages, or other majority, when their father's or mother's portion shall be paid to each of them, but in case the survivor should come to enter into a second marriage he or she shall be bound and obliged, before the solemnization thereof, to choose

and appoint two good and irreproachable men as supervising guardians of the 'Kinderbewijs' then to be provided, without, however, the necessity of paying out the portions of the minors, but such portions to remain committed to the care of the survivor for the purpose of thus being better able to educate and maintain the minor child or children by the usufruct of their inheritances."

It is maintained for the appellants that what was given to the children by this will was simply their legitima portio under Roman-Dutch law, that is to say, in the present case, where the family exceeds four in number, a division of one half of the mother's estate among the eight children, and that the other half fell to the father who was appointed sole and universal heir.

With regard to the argument that the children's share falls to be limited to the legitima portio, it is of course plain that no doubt can be thrown upon the validity of that portion of the Roman-Dutch law which was the law of the Transvaal until 1902, and is in accord with many systems of jurisprudence, and founded on the law of Rome, under which a portion of a parent's estate is succeeded to by the child as by legal right, and notwithstanding the terms of the parent's will. The power of testacy is thus limited so as to prevent disinheritance or the limitation of the legal right of the children.

It must be added, however, that it seems in principle unlikely that, unless the language of a will expressly limits the share of the child to the legitima portio, the law would apply a restriction by a will to what the child could have taken irrespective of that will.

It must be admitted that there does seem to be authority for the operation of tying up till majority even the legitima portio. In the words of Van Der Keessel's Select Theses, being a commentary on Grotius' Introduction to Dutch Jurisprudence, 2nd ed., p. 110, "The legitimate portion due to minor children may, by our law, be left to them, subject to the condition that the surviving parent need not pay them anything before majority, but may receive the fruits thereof for their maintenance."

As, however, in their Lordships' opinion, the children's share conferred by Mrs. Rood's will was not confined to a legitima portio, it is not necessary to discuss or decide upon the application of the doctrine thus quoted from Van Der Keessel.

J. C.

1910

NATAL  
BANK,  
LIMITED  
v.  
ROOD.  
—



J. C.  
1910  
NATAL  
BANK,  
LIMITED  
v.  
ROOD.  
—

In the next place, it appears to their Lordships to be clearly established that the clauses which have been above cited from the mutual will are the common, accepted, and habitual forms of language employed in such documents. Here and there there may be certain variations, but forms at least very similar to, if not identical with, the present appear for at least about eighty years in South Africa. Reference, for instance, may be made to the case of *Widow Cleeweek v. Bergh*. (1)

It is, in their Lordships' opinion, eminently desirable that the utmost respect should be paid to the customary and acknowledged interpretation both by judges and among the people of the Transvaal and the Cape of Good Hope of their ancient and accustomed forms of transmission of property at death. On that subject there can, on the whole, be little doubt. The principle of interpretation may have occasionally been questioned, but the long-standing interpretation itself has been acknowledged. In 1868, for instance, in the case of *Oosthuizen*, reported in Buchanan's Cape of Good Hope Reports, 1868, at p. 71, O'Connor J., while saying that it was not easy to understand the principle of the matter, proceeds: "Mr. Porter, the plaintiff's counsel, stated it to have been decided in this Court that in such a will the surviving spouse is entitled absolutely to a child's portion. And from instances which have come before me, I think it not unlikely that that is the construction commonly adopted in practice."

In *Oosthuizen v. Moeke* (2) Watermeyer J. deals with the matter thus, his judgment being delivered on January 16, 1866: "The important question in this case arises as to the effect in a mutual will of an institution of the survivor 'as sole and universal heir or heiress in all the common estate, nothing excepted, to be adiated and possessed by the survivor as free and allodial property, with the condition that the survivor shall be held and bound to educate and bring up the child or children of the marriage, already born or yet to be born, in a decent and Christian manner until they shall become of age, or be married, or enter some other approved state, when to each of them for, or instead of father's or mother's portion (bewys) shall be paid such

(1) 2 Menzies, 396.

(2) 1 Roscoe, 230.

amount as the survivor, according to conscience, in the position of the estate shall find to be due (behooven).’ After a careful consideration of the principle by which the Court should be guided—for there is no direct authority on the subject—the conclusion arrived at is that the survivor is not entitled to cut off his children with the mere legitimate. The will, it is true, makes the survivor sole heir, but notwithstanding, she is not the sole heir: unless the children take *titulo institutionis*, they do not take at all. Strictly, such a will might be deemed inofficious, and would have been so by the Roman law. The more liberal construction of the Dutch law allows the will to be read as if the children were instituted, and thus *ex necessitate*, it must be read as if the survivor and the children were joint heirs. During the minority of the children the survivor remains in possession of the entire estate. When they attain their majority, the survivor must give to each such amount as he or she shall, according to conscience, in the position of the estate find to be due. If without sale the survivor can pay the amount, the estate need not be sold. The survivor must value conscientiously, and on an honest valuation, calculate the children’s shares. It is not to be presumed that the testator intended the children to have the legitimate merely, when he did not say so. The children are to have as paternal or maternal portions what shall really be such portions on an honest valuation of the estate, to which captious objections are not to be made.”

Their Lordships have, in the present case, had the advantage of a full argument, and they entertain, after hearing the careful presentation of the case upon practice made by Mr. Gregorowski, no doubt as to the soundness of the conclusion reached by the Supreme Court. They desire in terms to found upon the judgment of the learned Chief Justice, not only in his view as to *Oosthuizen’s Case* (1), but more particularly in his statement as to professional and common practice: “The will there was in terms practically identical with the one which came before the Court in *Wium’s Case* (2), and it was held that the children shared equally with the survivor in the estate of the first dying—in other words, that the survivor had a half of the estate plus a child’s

J. C.

1910

NATAL  
BANK,  
LIMITED  
v.  
ROOD.

(1) 1 Roscoe, 230.

(2) 2 Menzies, 431.

J. C.  
1910  
NATAL  
BANK,  
LIMITED  
v.  
ROOD.

portion. That was a decision pronounced by Watermeyer J., a judge distinguished for his knowledge of Roman-Dutch law, and his acquaintance with Colonial circumstances and Colonial practice; and it has always been followed at the Cape. We were not referred to any other South African decision inconsistent with *Moeke's Case* (1), and I am satisfied that, as this is a very common form of will among the country population in South Africa, the decision in *Moeke's Case* (1) has virtually settled the law in regard to the interpretation of such will, and certainly we should follow it in the Transvaal. Moreover, the present will is stronger in favour of the children than either of the wills considered in the two cases to which I have referred. In those wills the survivor was ordered, in place or instead of the father's or mother's portion, to pay out to the children when they attained majority, such shares as, in accordance with the condition of the estate, and according to conscience, they thought the children were entitled to. Here the survivor is directed to pay to the children at majority their actual paternal or maternal portions—that is, not their legitimate, but their filial portions. I am, therefore, of opinion that the meaning of the present will is that the survivor should retain his half of the joint estate and a child's portion of his wife's half, and that, therefore, each child would be entitled to one-ninth of what the testatrix was entitled to bequeath; subject to the further provision that the survivor was to enjoy the usufruct of the children's portions during their minority in order to support and educate them."

In any circumstances a pronouncement of this kind would be weighty; but, stating as it does the established practice, their Lordships view it as in a special sense authoritative. The argument of the appellants in giving one half only to the children and, under the clause as to sole and universal heirship, giving the other half to the father, although possibly in accord with English ideas of interpretation in regard to the mutual will as a whole, would, if given effect to, make an inroad into interpretation, custom, and practice so violent as to result in a subversion of the settled law of the Transvaal. The argument has been considered with care, but their Lordships, without

(1) 1 Roscoe, 230.

hesitation, reject it. The law so settled must be respected and maintained.

This ought to be so in principle, and it is very fully warranted by authority. When a construction in conveyancing law has become locally settled, then it is of especial importance that ideas foreign to and subversive of the adopted interpretation should be avoided. A striking instance may be given in the case of *Kirkpatrick's Trustees v. Kirkpatrick*. (1) There it was held that a mortis causa disposition of real estate was wholly invalid because the word "dispone" was not used. Lord Cairns put the point thus : "It appears that the later deed of 1867 has not in it that word of art and style of such efficiency according to Scotch law, I mean the word 'dispone,' and it has been held unanimously by all the judges of the Court of Session that as the law stood at the time this deed was executed the want of that word 'dispone' was fatal to the deed as a conveyance of heritable property. My Lords, the appellants at your Lordships' Bar challenged this decision, but during the argument it was your Lordships' opinion, after hearing all they had to urge against it, that looking to the unanimity prevailing in the Court below upon this question, and the dicta which have fallen from judges in Scotland upon the subject, looking to the expressions of text-writers as indicating the opinion and practice of the profession, it would be impossible now to open or disturb the question as to the necessity for this word 'dispone' in a conveyance of heritable property."

It had, it may be explained, required the action of the Legislature to alter by statute the settled rule of practice referred to; but as the Act was passed subsequent to the death of the testatrix Mrs. Kirkpatrick, the old standing law of Scotland was held to apply. Lord Cairns admitted that the opinion might appear to be "a very technical view"; but the House unanimously affirmed the binding nature of locally accepted practice.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants : *Travers Smith, Braithwaite & Co.*

Solicitors for respondents : *Watkin Williams, Steel & Hart.*

(1) (1874) 1 R. 37.

J. C.

1910

NATAL  
BANK,  
LIMITED  
v.  
ROOD.



[PRIVY COUNCIL.]

J. C.\* J. C. THOMPSON . . . . . APPELLANT ;  
1910 AND  
July 6, 7, 15. EQUITY FIRE INSURANCE COMPANY AND } RESPONDENTS.  
ANOTHER . . . . . }

ON APPEAL FROM THE SUPREME COURT OF CANADA.

*Fire Insurance Policy—Protection from Liability while Gasoline is stored or kept in the Building insured—Construction—“Stored or kept.”*

In an action upon a fire insurance policy the company relied upon a statutory condition protecting from liability “for loss or damage occurring while gasoline is stored or kept in the building insured.” It appeared that the fire was caused by a small quantity of gasoline in a stove which was being used for cooking purposes, no other gasoline being in the building :—

*Held* that, whatever the precise signification of the words “stored or kept,” there was no infringement of the condition having regard to the ordinary meaning of the words used.

APPEAL by special leave from a decree of the Supreme Court of Canada (April 5, 1909) reversing a judgment of the Court of Appeal for Ontario (June 19, 1908) which affirmed the judgment of the trial judge in favour of the appellants.

The action was on a policy of fire insurance dated June 12, 1906, whereby the plaintiff’s building in the town of New Liskeard was insured in the sum of \$2000. It was destroyed by fire on September 4, 1906. The defence of the insurance company maintained in this appeal was based on a statutory condition in the policy which provides that the company is not liable for loss occurring while gasoline (the American name for petrol) is stored or kept upon the premises insured. This condition is one of those which by the Insurance Act of Ontario (R. S. O., c. 203, s. 168) are incorporated into every policy of fire insurance.

The question decided was whether on the facts stated in the judgment of their Lordships there had been a breach of this condition.

\* *Present*: LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MERSEY.

The trial judge considered that "stored or kept" connoted "something in the nature of dealing in such articles or having a storehouse therefor." The Court of Appeal affirmed this judgment, but the Supreme Court by a majority reversed it.

The material part of the judgment of Fitzpatrick C.J., whose view prevailed, is as follows :—

"The object of this statutory condition, which is part of the consideration of the policy, is to decrease the risk of destruction by fire of the thing insured, and, by limiting the peril insured against, to proportionately lessen the obligation of the insurer to indemnify the insured; and to that end it prohibits the storing or keeping on the premises of the very inflammable substances enumerated, i.e., gasoline, &c. Can it be said that the insured did not violate this condition of the contract which he entered into with the company when he brought upon the premises gasoline, one of the prohibited articles, and which he kept there for several days and used in a gasoline stove for cooking purposes? I cannot find anything in the record to shew that there was any limitation of the time during which it was intended to use the stove for which the gasoline was required. It is said to have been discarded; but as a fact it was available for use at any time, as evidenced by the fact that the fire was caused by the use of the gasoline stove and its contents.

"I do not think it is necessary to either extend or restrict the meaning to be given to the words 'stored or kept.' They are to be read along with the context, and the whole section must have a reasonable interpretation, such as was probably contemplated by the parties at the time the contract was entered into. For a dealer to store or keep for commercial traffic during a protracted period the excluded substances on the insured premises under proper conditions of safety would, it is admitted, be a breach of the condition; but it is argued that to keep them for occasional daily domestic use during months under such conditions as common sense suggests are most likely to bring about the destruction of the premises is not a violation of such a condition. With proper deference and fully sensible of the weight to be attached to the opinions of the distinguished judges below, I am obliged to say that I cannot accept such a conclusion

J. C.

1910

THOMPSON

v.

EQUITY FIRE  
INSURANCE  
COMPANY.

J. C.      which necessarily involves the inference drawn by Mr. Hellmuth  
 1910      that the destruction of the property as a result of the use of  
 THOMPSON      gasoline in a gasoline stove kept on the premises is one of the  
 v.      perils insured against, whereas the destruction of the property  
 EQUITY FIRE      while gasoline is stored or kept under proper conditions as  
 INSURANCE      regards safety would not be a risk insured against.”  
 COMPANY.

*H. D. Gamble, K.C.*, for the appellant, contended that on the evidence gasoline was not “stored or kept” upon the insured premises within the meaning of the statutory condition. He had in June, 1906, used a gasoline stove for cooking. He then abandoned it, putting it away in an unused room with about a pint of unconsumed gasoline in its reservoir. It was not used again till the day on which the fire occurred. The reasonable construction of the words used, it was submitted, was that they indicated continuous storage on the premises for commercial purposes: see *Mitchell v. City of London Fire Insurance Co.* (1) and the Insurance Act of 1887 (R. S. O., c. 87), which, it was contended, gave legislative sanction to that construction. Reference was also made to *Dobson v. Sotheby* (2); *Shaw v. Robberds* (3); *Glen v. Lewis* (4); *Pandorf v. Hamilton* (5); *Pugh v. Golden Valley Ry. Co.* (6); *Palmer v. Johnson.* (7)

*W. E. Raney, K.C.*, for the respondent company, contended that the judgment of the Supreme Court was right for the reasons stated by the Chief Justice. The word “kept” is to be understood in its broad, colloquial, and well-understood sense and not in the narrow sense of commercial storekeeping. The reasonable meaning of the condition was that if gasoline was brought on the premises for heating or manufacturing purposes the risk of fire was materially increased and the policy was avoided. It could not apply only to the commercial risks involved in storing and not to the much more dangerous risks of user. He referred to *Biggs v. Mitchell* (8); *Giles v. Melsom* (9); *Attorney-General v.*

(1) (1886) 12 Ont. Rep. 706, 744.

(2) (1827) Moo. & M. 90.

(3) (1837) 6 Ad. & E. 75, 81.

(4) (1853) 8 Ex. 607.

(5) (1886) 17 Q. B. D. 670.

(6) (1880) 15 Ch. D. 330.

(7) (1884) 13 Q. B. D. 351.

(8) (1862) 2 B. & S. 523.

(9) (1873) L. R. 6 H. L. 24.

*Mercer* (1); *Larsen v. Sylvester* (2); *Thorman v. Dowgate Steamship Co., Ltd.* (3); *Keen v. Thomas* (4); *McCurdy v. Orient Insurance Co.* (5); and *Boyce v. Grand Rapids Fire Insurance Co.* (6)

J. C.  
1910  
THOMPSON  
v.  
EQUITY FIRE  
INSURANCE  
COMPANY.

*Gamble, K.C.*, in reply.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The appellant, J. C. Thompson, was the owner of a building in New Liskeard, Ontario, which was insured against fire with the respondents, the Equity Fire Insurance Company. On September 4, 1906, the building was burnt down. A claim was made under the policy. It was resisted on various grounds which have all been disposed of but one. The only question remaining is whether the policy was avoided by reason of the presence on the premises at the time of the fire of a small quantity of gasoline.

The statutory condition on which the insurance company relies declares that "The company is not liable . . . for loss or damage occurring while . . . gasoline . . . is . . . stored or kept in the building insured."

The facts of the case are not in dispute. The lower part of the building was used by Thompson as a drug store and furniture shop. He had an assistant named Post, a qualified chemist and druggist. Post and his family occupied the upper part of the building as a dwelling-house. In June, 1906, Post procured a gasoline stove for cooking purposes. He used it for a short time and then put it by with the gasoline which happened to be in it.

On the day of the fire some syrups were wanted in a hurry. The man who usually made them and always made them by what is called the cold process was absent. Post bethought him of this disused stove, brought it downstairs with the gasoline in it, and lighted it in a room behind the shop in order to make the syrups he required by the more rapid process of boiling. And then in some way which is not ascertained—for the stove was in the back room and Post was in the shop at the moment—the fire

1910  
July 15.

(1) (1883) 8 App. Cas. 767, 777, 778.

(2) [1908] A. C. 295.

(3) [1910] 1 K. B. 410.

(4) [1905] 1 K. B. 136.

(5) (1906) 30 Penn. S. C. 77.

(6) (1900) 124 Mich. 455.



J. C. broke out suddenly. It was caused, no doubt, by this gasoline stove.

1910

THOMPSON  
v.  
EQUITY FIRE  
INSURANCE  
COMPANY.

The question is, Did the loss occur while gasoline was "stored or kept" in the building? It is common ground that there was no gasoline in the building but what was in the stove, and it seems that the quantity of gasoline in the stove was about a pint.

What is the meaning of the words "stored or kept" in collo- cation and in the connection in which they are found? They are common English words with no very precise or exact signification. They have a somewhat kindred meaning and cover very much the same ground. The expression as used in the statutory condition seems to point to the presence of a quantity not inconsiderable, or at any rate not trifling in amount, and to import a notion of warehousing or depositing for safe custody or keeping in stock for trading purposes. It is difficult, if not impossible, to give an accurate definition of the meaning, but if one takes a concrete case it is not very difficult to say whether a particular thing is "stored or kept" within the meaning of the condition. No one probably would say that a person who had a reasonable quantity of tea in his house for domestic use was "storing or keeping" tea there, or (to take the instance of benzine, which is one of the proscribed articles) no one would say that a person who had a small bottle of benzine for removing grease spots or cleansing purposes of that sort was "storing or keeping" benzine.

The learned counsel for the respondents contended that the presence of gasoline on the premises was enough to bring the statutory condition into operation, and he referred to the accident which did happen as an example of the danger against which precautions are required. But it is obvious that the danger guarded against is not ignition caused by the article itself, but the risk of spreading or increasing the conflagration when once started and in progress by the presence of highly inflammable or explosive material. The fact that the fire in the present case was caused by the gasoline is irrelevant. And the fatal objection to the defendants' contention is that it gives no effect whatever to the words "stored or kept." The sentence would be complete

and the meaning which the defendants seek to attribute to it might possibly or even probably prevail if the words in question had been omitted altogether, and the condition had excluded liability for "loss or damage occurring while . . . gasoline . . . is . . . in the building insured." Some meaning must be given to the words "stored or kept." Their Lordships think those words must have their ordinary meaning. So construing them their Lordships come to the conclusion that the small quantity of gasoline which was in the stove for the purpose of consumption was not being "stored or kept" within the meaning of the statutory condition at the time when the loss occurred.

A good many cases were cited in argument from English, Canadian, and American books. But on such a question as this very little help is to be got from the citation of reported decisions. For the most part the language to be construed was not the same. When the language was similar the circumstances were very different.

Their Lordships will therefore humbly advise His Majesty that the order appealed from should be reversed and the plaintiff's claim allowed with costs here and below.

Solicitors for appellant: *Thompson, Fox & Preece.*

Solicitors for respondents: *Blake & Redden.*

J. C.

1910

THOMPSON

v.  
EQUITY FIRE  
INSURANCE  
COMPANY.

[PRIVY COUNCIL.]

J. C.\*      MONTREAL LIGHT, HEAT, AND POWER } PLAINTIFFS;  
1910      COMPANY . . . . . }

July 7, 8, 25.      AND  
H. B. SEDGWICK AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

*Marine Insurance—Civil Code of Lower Canada, art. 2522—Insurance against total Loss of Cargo “by total loss of vessel”—Construction—Total Loss of Thing insured.*

By a policy of marine insurance a cargo of cement was insured against total loss “by total loss of the vessel.” In an action thereon the jury found that barge and cargo had been practically if not completely submerged, that there had been an actual total loss of the cargo, caused by the wreckage of the barge, which, however, was not found in so many words to have been a total loss, and judgment was entered for \$2700 damages:—

*Held*, that the findings were amply sustained by the evidence and were to the effect that the loss of the cement insured had occurred in the manner contemplated by the policy; and that the order of the Supreme Court for a new trial directed to the issue whether the barge was a constructive total loss within the meaning of art. 2522, C. C., must be reversed.

APPEAL by special leave from a judgment of the Supreme Court (May 4, 1909) which reversed a judgment of the Court of review in the Province of Quebec (April 22, 1908) affirming a judgment of the trial judge (December 7, 1906) in favour of the appellants on the verdict of the jury.

The order granting special leave directed that the respondents be at liberty in their printed case to raise objections to the judgment appealed from without a cross-appeal.

The appellants’ declaration alleged in substance that the barge *Maria*, in which the insured cargo was laden, was wrecked in the course of her voyage, and that both the vessel and her cargo became a total loss and were abandoned as such. The respondents denied these allegations, and alleged that the barge

\* *Present*: LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD MERSEY, and SIR HENRI ELZÉAR TASCHEREAU.

*Maria* could have been restored to as good condition and order as she was in immediately previous to the disaster for a sum of \$1046.48, and that a portion of the cargo could have been salvaged and delivered sound at the port of destination; that no sufficient grounds existed for the abandonment either of the vessel or of the cargo; and that the alleged attempts at abandoning were unjustifiable and illegal.

The appellants joined issue and further alleged that the barge was never put in proper repair to continue her voyage, and that the cost of the repairs which were made was more than she was worth when the repairs were completed, and that the raising and repairing of the barge were not made in good faith, but for the sole purpose of attempting to evade payment of the amount of the insurance.

The jury found in substance that the loss covered by the policy had occurred, and the trial judge gave judgment for the amount claimed. The seventh and tenth findings, which their Lordships held to be irrelevant, were that the barge had never been put in proper repair to continue her voyage, and that there had been a constructive total loss of it.

The judgment of the Court of review contains this passage: "What was it to the owner of the cement after it had become a total loss to him, whether the barge could be raised and repaired at a profit or a loss? That did not concern him in any way, no more than whether there was on that day an eclipse of the sun or the moon. Let the owner of the barge and its insurer fight their own quarrel; the issue of it was of no import to the owner of the cement. He proved, as the jury decided, that the cement was submerged with the barge and became a complete loss by reason of the wreckage and submersion of the vessel, and that was enough."

The Supreme Court ordered "That the judgment below should be vacated and the finding of the jury upon the tenth question set aside. The action should be remitted to the Superior Court in order that another jury may determine the break-up value of the wrecked vessel, which they should be asked to find specifically. They should also be asked to find whether the vessel was or was not a constructive total loss according to

J. C.

1910

MONTREAL  
LIGHT,  
HEAT, AND  
POWER  
COMPANY  
v.  
SEDGWICK.



J. C.  
1910  
MONTREAL  
LIGHT,  
HEAT, AND  
POWER  
COMPANY  
v.  
SEDGWICK.

the test propounded in *Macbeth & Co., Ltd. v. Maritime Insurance Co.* (1) Upon the findings already made which are undisturbed, supplemented by such new findings, the Superior Court will then direct such judgment to be entered as it deems proper."

It quoted from the trial judge's charge to the jury this passage: "It is constructive total loss when the voyage and adventure are lost or not worth pursuing. There is no doubt this voyage was not pursued. It was not continued. Was it worth continuing under the circumstances with the cargo gone? Now it is a matter for you to decide." It decided that it was impossible to support the finding of constructive total loss of the vessel based upon this direction. It also ruled that art. 2522 of the Civil Code which had been cited to the jury appeared "to be intended for application only to the case of loss of cargo."

Art. 2522 of the Civil Code is the only article which defines an absolute or constructive total loss and is as follows: "Total loss may be absolute or constructive. It is absolute when the thing insured is wholly destroyed or lost. It is constructive when by reason of any event insured against the thing, though not wholly destroyed or lost, becomes of little or no value to the insured, or the voyage and adventure are lost or rendered not worth pursuing. Before the insured can claim for a constructive total loss, he must make an abandonment as declared in the following section."

*Adkin, K.C.*, and *Geoffrion, K.C.*, for the appellant, contended that art. 2522 of the Quebec Civil Code applied to the loss of the vessel as well as to that of the cargo. The test propounded in *Macbeth's Case* (1) for the determination of constructive total loss is not the test sanctioned by the Civil Code. Art. 2522 supplemented by art. 2545 declares the conditions on which an abandonment can be made. They are practically taken verbatim from the Code de Commerce: see Report of the Codifiers, vol. 3, pp. 224 and 240. The codifiers cite as their authority for the article Marshall and Arnold under art. 2522, and under art. 2545 they cite Emerigon, Phillips and Code de Commerce, art. 289. Reference to these authorities in the editions current

(1) [1908] A. C. 144.

at that time shews that they specifically include the cases referred to in art. 2522 as constituting the constructive total loss of the vessel as well as of the cargo: see Marshall, 4th ed. (1861), p. 474, and Phillips, 5th ed. (1867), pars. 1485, 1519, 1524, and 1526. The doctrine of abandonment there laid down was in accordance with that laid down by Lord Mansfield in *Goss v. Withers* (1) and *Hamilton v. Mendes* (2), which was to the effect that if the voyage was lost or rendered not worth pursuing there was a constructive total loss of the vessel which entitled the owner to abandon. In this case the fact that the vessel was not only stranded and broken but was also completely submerged constituted a constructive total loss: see *Sailing Ship Blairmore Co., Ltd. v. Macredie* (3) and *Home Insurance Co. of New York v. Victoria Montreal Fire Insurance Co.* (4) The clear intention of the parties, it was submitted, was that the policy should cover the loss which had occurred, and there had been no misdirection by the judge and no exception taken to his charge as based upon art. 2522.

*Laflaur, K.C.*, and *Pope*, for the respondents, contended that the loss of the cargo had not resulted from the peril insured against, namely, the total loss of the vessel. It was conceded that as a result of what occurred the cargo of cement had become a total loss actual or constructive. And it was not disputed that the vessel was never an actual total loss. The main question was whether the vessel was totally lost within the meaning of the policy. On this point it was contended that the alternative definition of constructive total loss "or the voyage and adventure are lost or rendered not worth pursuing" contained in art. 2522 is not applicable to the loss of the vessel. The Supreme Court was right in setting aside the verdict that the vessel was a constructive total loss, and in directing that the applicable test in determining that issue was laid down in *Macbeth & Co., Ltd. v. Maritime Insurance Co.* (5) The rule in art. 2522 was adopted by the commissioners from the law of England: see Report of the Codifiers, vol. 3, pp. 226, 240, 244,

J. C.

1910

MONTREAL  
LIGHT,  
HEAT, AND  
POWER  
COMPANY  
v.  
SEDGWICK.

(1) (1758) 2 Burr. 687.

(3) [1898] A. C. 593.

(2) (1761) 2 Burr. 1209.

(4) [1907] A. C. 59.

(5) [1908] A. C. 144.

J. C. and 333; Marshall, 3rd ed. (1823), pp. 486, 596, c. 13, s. 1, pp. 563,  
 1910 564; Arnold, 2nd ed. (1857), p. 1007. When a provision of the  
 MONTREAL Code is derived from French law it is to be interpreted by French  
 LIGHT, authorities, and when derived from English law by English  
 HEAT, AND authorities: see *Renaud v. Lamothe* (1) and *Wardle v. Bethune*. (2)  
 POWER The English jurisprudence at the time of the codification (1867)  
 COMPANY establishes that the rule of constructive total loss in art. 2522  
 v. is construed to mean that the ship becomes of little or no value  
 SEDGWICK. to the owner when the estimated cost of repairs will exceed the  
 value of the ship when repaired, and that the loss of the voyage  
 has nothing to do with the loss of the ship, unless the damage  
 to the ship is so great that she cannot be put in a state of repair  
 necessary for the pursuing of the voyage except at an expense  
 greater than her value when repaired. Reference was made to  
*Pole v. Fitzgerald* (3); *Falkner v. Ritchie* (4); *Parsons v.*  
*Scott* (5); *Young v. Turing* (6); *Gardner v. Salvador* (7); *Irring*  
*v. Manning* (8); *Moss v. Smith* (9); *Rosetto v. Gurney* (10);  
*Roux v. Salvador* (11); *Benson v. Chapman*. (12)

*Geoffrion, K.C.*, in reply.

1910  
 July 25.

The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from an order of the  
 Supreme Court of Canada, dated May 4, 1909, reversing an  
 order of the Court of review of the Province of Quebec, dated  
 April 22, 1908, and directing a new trial of an action brought  
 by the appellants (plaintiffs) against the respondents (defendants)  
 on a certain policy of insurance, dated May 15, 1903, to recover  
 the sum of \$2700 damages in respect of the total loss of a cargo  
 of cement claimed to be covered by the policy.

The action was tried before Hutchinson J. and a special jury,  
 and resulted in a verdict for the appellants for the above-  
 mentioned sum, upon which judgment was on December 7,  
 1906, duly entered.

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| (1) (1902) 32 Can. S. C. R. 357, 366. | (7) (1831) 1 Moo. & R. 116, 118.  |
| (2) (1871) L. R. 4 P. C. 33, 52.      | (8) (1848) 6 C. B. 391.           |
| (3) (1752) Willes, 641.               | (9) (1850) 9 C. B. 94.            |
| (4) (1814) 2 M. & S. 290.             | (10) (1851) 11 C. B. 176, 186.    |
| (5) (1810) 2 Taunt. 363.              | (11) (1836) 3 Bing. N. C. 266.    |
| (6) (1841) 2 Man. & G. 593.           | (12) (1843) 6 Man. & G. 792, 810. |

The facts are simple. The appellants, on or before May 18, 1903, shipped on board a certain barge, of the class specified in the policy, named *Maria*, belonging to one Page, 1500 barrels of cement to be carried to a place called Chambly Canton, situated on the river Richelieu, one of the tributaries of the St. Lawrence.

The barge, which was about ninety feet in length, was to be towed on this trip or voyage. On the following day while en route she struck against a snag in this river, knocking a hole in her bow of about three feet by two in size. She settled down on the shelving bank of the river, and about seventy feet of her deck were completely submerged. Her bow was held up, presumably, by the snag, which had pierced her hull, or by the upper part of the bank of the river; her stern was sunk in the deeper part of the stream, and all but a very small portion of the cement was by the wetting turned, as it were, into stone and completely destroyed as cement. It was scarcely contended, and could not be contended successfully, that the cargo had not been totally lost. It was abandoned. No fault was found with the amount of the damages awarded, if the defendants were liable for damages at all. The policy of insurance was very peculiar in form. It purported to insure against the total loss of the cement "by total loss of the vessel." The defendants based their defence substantially on these six words "by total loss of the vessel," and contended that they were not liable because, though the cargo of cement, the thing insured, was totally lost and abandoned, the barge which carried it was not totally lost.

The result was that the case was tried very much as if the action had been brought by Page, the owner of the barge, against a company which had insured his barge, for total loss of the thing insured, the barge.

The construction of art. 2522 of the Civil Code of Lower Canada; its history and genesis; the question whether its framers intended it to be an embodiment of the principles of the English law on the subject of constructive total loss, or of the principles of the French law on that subject, were each much discussed. But art. 2522 only purports to define what is a constructive total loss of "the thing insured." "The thing insured" in this case was

J. C.

1910

MONTREAL  
LIGHT,  
HEAT, AND  
POWER  
COMPANY  
v.  
SEDGWICK.



J. C.  
1910  
MONTREAL  
LIGHT,  
HEAT, AND  
POWER  
COMPANY  
v.  
SEDGWICK.

the cement. Of this the loss was absolute, not constructive at all. Whether the barge, as she lay submerged, was so valuable or was so slightly damaged that a prudent owner would, with a reasonable regard to his own interest, most probably cause her to be raised and repaired, or was of such small value, or so seriously damaged that he would most probably not think she was worth being raised and repaired, but would abandon her—vital issues if the action was one for the loss of the barge—, were matters which in no way affected the loss the plaintiffs, in fact, sustained. And it is difficult to suppose that the parties to this policy of assurance ever entered into it with the intention that these considerations, not in any way affecting the loss the plaintiffs sustained, should be made of the very essence of the contract, and decisive on the question of their right to recover.

Cement being easily damaged by water, it is obvious that the defendants would naturally desire to protect themselves from liability for a partial or total loss of the cargo, caused by a slight injury to the barge, or by some casual incident of the voyage; but where a total loss of the cargo is brought about by such a wreckage of the barge as resulted in her sinking to the bottom of the river, becoming entirely flooded, and almost entirely submerged, the peril which the parties to the contract meant to guard against must, their Lordships think, be held to have supervened, and the total loss of the barge which they contemplated be held to have resulted. This would appear to be the view taken by the Court of review upon this point. In their Lordships' opinion it is the true view.

Having regard to this view, then, unless the jury were misdirected to the defendants' prejudice, their answers to questions 3, 4, 5, 11, and 12 in substance dispose of the case. The questions and answers were as follows:—

“3. Was the said barge *Maria* in the course of her voyage to Chambly Canton wrecked in the Richelieu River and did she sink to the bottom?—Yes.

“4. Were the said barge and the said cargo completely submerged any time on that occasion and trip?—Practically submerged if not completely.

"5. Were the said barge and the said cargo abandoned by the owners as a total loss?—Yes.

J. C.

1910

"11. Was the said cargo an actual or constructive total loss?—Actual total loss.

MONTREAL  
LIGHT,  
HEAT, AND  
POWER  
COMPANY  
v.  
SEDGWICK.

"12. Could a portion of said cement have been salvaged at small cost and delivered sound at Chambly Canton?—No."

Taken together, the findings amount to a finding that the loss covered by the policy had in fact occurred, though they have not found in so many words that the barge was a total loss, and it is not contended that there was not ample evidence in the case to sustain each of these findings. Indeed, if the jury had answered those questions otherwise than they did, so preponderating was the evidence, that their findings, if challenged, could scarcely be allowed to stand.

No substantial wrong or miscarriage of justice therefore has been brought about by the alleged misdirection, since, if the judge misdirected at all, he misdirected in reference to questions 7 and 10, which, in their Lordships' view, are irrelevant questions. The fact found by question 10 would be evidence, no doubt, on the question of what a prudent owner would do with the wreck, and had the issue for decision been whether or not the barge was a constructive total loss within the meaning of art. 2522, it could not be contended that this question was rightly framed, but their Lordships are of opinion, for reasons already given, that this latter was not properly a matter for decision at all. It lay outside the proper issue, namely, whether the loss of the thing insured, the cement, had in fact occurred or been occasioned within the meaning of the policy. At the same time their Lordships think it right to say that the trial judge's remark in reference to question 10, that the voyage was not pursued, was not in any sense an instruction to the jury, but was, as he himself said, a mere statement by him of an undisputed fact in the case.

For these reasons their Lordships are of opinion that there was no miscarriage of justice at the trial; that the interests of the defendants were not unfairly prejudiced; that the substantial issue of fact upon which the liability of the defendants turned in

J. C.  
1910  
MONTREAL  
LIGHT,  
HEAT, AND  
POWER  
COMPANY  
v.  
SEDGWICK.

law was in substance tried; that the findings of the jury upon the several issues which together constitute this substantial issue were amply sustained by the evidence; that consequently there should not be a new trial of this action; and that the decision appealed from granting it should therefore be reversed and the decision of the Court of review on these points restored. Their Lordships are further of opinion that judgment could not on the evidence in the case and findings of the jury be entered for the defendants non obstante veredicto. It is unnecessary to consider whether it is open to the defendants to apply for this latter relief, the decision appealed from having been in their favour. Their Lordships therefore think the appeal should be allowed, and will humbly advise His Majesty accordingly.

The respondents must pay the costs of the hearing here and in the Supreme Court.

Solicitors for appellants : *Lawrence Jones & Co.*

Solicitors for respondents : *Botterell & Roche.*

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[PRIVY COUNCIL.]

J. C.\* JAMES FRANCIS WHITE AND ANOTHER . . PLAINTIFFS;  
1910  
AND  
July 8, 12, 29. VICTORIA LUMBER AND MANUFACTURING }  
COMPANY, LIMITED . . . . . } DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH  
COLUMBIA.

*Law of British Columbia—Action for Damages for Death of Appellants' Son  
—Negligence by Respondents—Misdirection as to Contributory Negligence  
by Deceased—Practice—Judge's Charge not excepted to at the Trial or in  
First Appeal.*

In an action for damages for the death of appellants' son while acting as engineer of the respondents' lumber train the respondents were charged with negligence in respect of the train having been equipped

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\* *Present* : LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD MERSEY, and SIR HENRI ELZÉAR TASCHEREAU.

with defective brakes and an incompetent brakesman, while the deceased was charged with contributory negligence in jumping from the train.

The jury found for the appellants, but a new trial was ordered by the Supreme Court. One judge was dissatisfied with the verdict on the ground of misdirection in regard to contributory negligence, and another judge held, contrary to both his colleagues, that the damages were excessive:—

*Held*, that the order must be reversed. It was too late for the respondents to rely on misdirection which they had not excepted to at the trial or in the notice of appeal or in oral argument before the Supreme Court. There were no sufficient grounds for a new trial on the head of excessive damages.

APPEAL from a judgment of the Full Court (September 7, 1909) setting aside the judgment of Clement J. (March 14, 1908) and ordering a new trial. See 14 B. C. R. 67.

The action was brought by the appellants, the parents of an engine driver named Leonard White, who was killed whilst employed on the respondents' mountain railway by reason of his having jumped off his engine whilst the same was running away down hill. The appellants maintained that the deceased man was killed through the respondents' negligence, the main complaints being that the brakes of the train were defective and caused the train to run away; that the respondents employed an incompetent brakesman to look after the brakes of the train; and that a siding or safety switch on the railway was unfit for the purpose for which it was provided. They also made an alternative claim under the Employers' Liability Act.

The respondents contended that there was no negligence on their part, but that the accident was caused by the deceased man not keeping proper control of his engine and train and allowing it to travel at too great speed down the inclines of the lines and to run away.

The verdict was for \$6000, namely, \$2600 to the male plaintiff and \$3400 to the female. On appeal both verdict and judgment thereon were set aside and a new trial ordered.

Hunter C.J. held that the proper inference to be drawn from the evidence was that the accident was caused by the want of care of the deceased man, and that judgment ought to be entered for the respondents, or, if not, that there should be a new trial. Irving J. held that the damages were excessive, representing as

J. C.

1910

WHITE

v.

VICTORIA

LUMBER

AND

MANU-

FACTURING

COMPANY,

LIMITED.



J. C.  
1910  
WHITE  
v.  
VICTORIA  
LUMBER  
AND  
MANU-  
FACTURING  
COMPANY,  
LIMITED.

he thought the value of an annuity of \$40 a month for the lives of the plaintiffs, and that there should be a new trial on this ground. He held that there was evidence that would justify the jury in holding that the brakeman was incompetent, that the accident was the result of his incompetency, and that the respondents did not take sufficient care in selecting him. Morrison J. dissented from both these views and held that there was evidence to go to the jury from which they might arrive at the verdict given.

*Joseph Martin, K.C.*, and *G. E. McCrossan*, for the appellants, contended that, the facts and the proper inferences from the facts being in dispute, the issue as to contributory negligence was for the jury to decide. As to the main issue regarding negligence by the respondents it was contended that all the judges had affirmed that there was evidence to go to the jury and that the verdict was not unreasonable. The majority of the Court approved the assessment of damages and it could not be held that they were so excessive as to justify a new trial. As regards misdirection, no objection to the charge had been taken at the trial or in the notice of appeal.

*Simon, K.C.*, and *Rowlatt*, for the respondents, contended that the verdict was against the weight of evidence, which shewed clearly that the accident was solely due to the deceased driving too fast. It was contended that the judge at the trial gave no sufficient charge or direction to the jury and misdirected them that the respondents might be liable on the ground of the insufficiency of the safety switch, and that if a proper safety switch would have prevented the accident the respondents were liable notwithstanding negligence by the deceased: see *Butterfield v. Forrester*. (1) The evidence in truth shewed that the safety switch was sufficient, for it did in fact prevent any accident to the engine which could have injured the deceased if he had remained upon it.

*McCrossan*, in reply, contended that the respondents could not rely on misdirection. It was not excepted to at the trial or on the first appeal. He referred to *Warmington v. Palmer* (2); *Scott v.*

(1) (1809) 11 East, 60.

(2) (1901) 8 B. C. R. 344.

*Fernie* (1); *Tanghe v. Morgan* (2); *Stone v. Rossland Ice and Fuel Co.* (3) With regard to contributory negligence he cited *Radley v. London and North Western Ry. Co.* (4)

J. C.

1910

WHITE

v.

VICTORIA  
LUMBERAND  
MANU-FACTURING  
COMPANY,  
LIMITED,

1910

July 29.

The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a judgment of the Full Court of the Supreme Court of British Columbia, dated September 7, 1909, setting aside a judgment by Clement J. in favour of the appellants, dated March 14, 1908, and ordering a new trial of the cause.

The respondents own and work a short mountain railway used for bringing timber down from the uplands in the interior to Chemainus in British Columbia. Certain portions of the line are of steep gradients, requiring that the trains should be worked with powerful engines and powerful brakes.

The appellants claimed damages from the respondents under the Families Compensation Act for the death of their son, George Thislow Leonard White, and in the suit negligence was attributed to the respondents in respect of White's death, which occurred on November 5, 1907, while he was acting as engineer of a lumber train. The points of negligence made by the plaintiffs were the incompetence of a brakesman, a man called Ben Guy, who on the occasion was making his first trip in the capacity of brakesman on the train, and who had had no previous experience with side brakes. Another ground of negligence was that the train was equipped with defective brakes. In the course of the pleadings of parties it was also alleged that what was denominated on the plans as a safety switch, that is to say, a siding into which trains which had upon the steep gradient got beyond control might be switched so as to avoid accident, had in point of fact never been constructed either to receive a full train or even been properly laid. In consequence thereof, it was alleged that the men who were handling the train had to jump from it while in motion, taking the chance of life, rather than enter what they called this "death trap." Of the four men handling the train two were

(1) (1904) 11 B. C. R. 91.

(2) (1904) 11 B. C. R. 76.

(3) (1906) 12 B. C. R. 66.

(4) (1876) 1 App. Cas. 754.

J. C.  
1910  
WHITE  
v.  
VICTORIA  
LUMBER  
AND  
MANU-  
FACTURING  
COMPANY,  
LIMITED.

killed and two were injured; one of those killed was the engineer White.

In addition to the general denial of negligence on their part, the defendants pleaded contributory negligence by White. In answer to the allegations as to the safety switch they averred that it was sufficient for the purpose for which it was intended, and that White's death was caused "by his wrongfully jumping from the said train while the said train was in motion." It should be noted that the pleadings of the defendant railway company with regard to the safety switch specially took this shape.

The case was tried in March, 1908, before Clement J. and a special jury. The jury found a verdict for the appellant James Francis White for \$2600, and for the appellant Elizabeth Lucy White for \$3400, and judgment was entered accordingly in their favour in the Supreme Court of British Columbia.

Thereafter a certain element of what may be termed judicial misadventure appears in the case. The learned Chief Justice Hunter clearly took a different view from that of the jury with regard to the effect of the evidence, and in particular he held that White had been guilty of contributory negligence. On these grounds he favoured entering up a verdict for the defendants. He further thought that a certain misdirection had been made as after referred to. In all those particulars his judgment was not concurred in by his two learned brethren. Irving J., on the other hand, thought that the verdict was good in all points except that, in his opinion, the damages were too high, and on that ground he thought there should be a new trial. On this point his judgment was not concurred in by his two learned brethren. Morrison J. thought that the verdict should in all points be left undisturbed. There being thus two judges dissatisfied with the verdict, a new trial was ordered, although each of those two judges differed from the other as to the grounds for ordering it. It is from the order for a new trial pronounced in these circumstances that this appeal is brought.

The misadventure, however, does not appear to end there, because the point of misdirection in respect of which a new trial was ordered by the learned Chief Justice had not been taken

either at the trial or in the reasons for appeal lodged with the Supreme Court, or even argued before that tribunal. On the other hand, the point of excessive damage, which was the ground of ordering a new trial so far as Irving J. was concerned, does not appear to have been argued either; and the learned judge, it was practically conceded at their Lordships' Bar, had formed an opinion upon that subject grounded largely upon a misapprehension of the evidence in the cause. A principal element in his view as to excessive damages was that he thought White was a man earning only \$75 a month, whereas in point of fact he drew \$85 a month with board and with overtime, and his average drawings were \$135 a month.

Their Lordships think it quite unnecessary to go in detail into the evidence put forward. They are clearly of opinion that there were ample materials before the jury to find that the defendants (respondents) were guilty of negligence, that the jury cannot be said to have been under any error in acquitting White of contributory negligence, and that there are no sufficient grounds for a new trial on the head of excessive damages.

Before leaving these parts of the case, their Lordships think it right to say, in view of the minutely critical examination which has been made of the charge of Clement J., that in their opinion that charge not only fully and impartially placed the substance of the evidence before the jury, but contained no element tending to mislead or confuse.

The above, however, is apart from a ground of misdirection which was pleaded at their Lordships' Bar. In the close of his charge to the jury, Clement J., referring to the safety switch, and without doubt, although he is not reported to have said so expressly, having in his mind the allegation that White was to be blamed for wrongfully jumping off the train rather than trusting to it, said: "If you say they should have had a safety switch, and if the presence there of a safety switch would have, in your opinion, actually prevented White's death, then the defendant company are liable, notwithstanding the fact that you might find that there had been carelessness or negligence on the part of Leonard White," and then the report adds, not "in jumping off the engine," but "in managing the engine on the way down."

J. C.  
1910  
WHITE  
v.  
VICTORIA  
LUMBER  
AND  
MANU-  
FACTURING  
COMPANY,  
LIMITED.



J. C.  
1910  
WHITE  
v.  
VICTORIA  
LUMBER  
AND  
MANU-  
FACTURING  
COMPANY,  
LIMITED.

The respondents (the railway company) found upon the sentence thus broadly expressed and plead that this is bad law, citing *Butterfield v. Forrester*. (1) To this the appellants reply that even in its broad sense the proposition is good law, citing the judgment of Lord Penzance in the case of *Radley v. London and North Western Ry. Co.* (2) And on these contentions a not unfamiliar argument was presented.

In their Lordships' opinion it is unnecessary to make any pronouncement upon the point, because it is quite too late in this litigation for the respondents to plead it. Both the appellants and the railway company have been ably represented by counsel at the trial and since; but at the trial no point of misdirection was taken. Their Lordships incline to the opinion that, if such a point had been indicated on the spot, the learned judge who presided at the trial might, and probably would, have instantly explained that his reference to the safety switch bore merely, and was meant to bear merely, upon the limited point upon which the pleadings of the parties had expressly joined issue, namely, whether a man was to be blamed for jumping from a train rather than remaining on it trusting to a safety switch which, owing to the fault of the defendants, afforded no safety, but involved a fatal peril. In the next place, the notice of appeal stating the grounds thereof in writing, according to the forms of the British Columbia Court, contains no ground or plea of misdirection. In the third place, their Lordships were informed, and the information is borne out by the report of the case, that such a ground was not even verbally pleaded before the Supreme Court. Reference was made to s. 66 of 3 & 4 Edw. 7, stat. 15 of the Province of British Columbia, and to cases in the British Columbia Court, as to the necessity, on the grounds of fairness to the other party, of a clear intimation of the grounds of appeal; but, in their Lordships' opinion, it is also unnecessary to pronounce upon these authorities. For in their judgment it is not open to a party who has not used the opportunity at the trial, nor, either in writing or in argument, used the opportunity in the Court of Appeal, to state for the first time at their Lordships' Bar an objection to the verdict of a jury

(1) 11 East, 60.

(2) 1 App. Cas. at p. 758.

on the ground of misdirection. It is, of course, possible that some highly exceptional case might arise, but in general it may be laid down that neither party to proceedings before the Privy Council should be permitted to start fresh points of objection which have been open to him and have been neglected at opportune and convenient stages of the litigation in the Colonial Courts. It is not in accordance with justice to the parties that, after an appeal has been made to the Privy Council, they should for the first time learn what the true nature of the case to be made against them is. Nor is such a course fair to the Colonial Courts, whose judgments would thus be attacked upon grounds which they had not had an opportunity of considering.

Their Lordships will humbly advise His Majesty that the order of the Full Court of the Supreme Court of British Columbia should be reversed, and the verdict and judgment of Clement J. should be restored, and that the appellants should have their costs here and in the Courts below.

Solicitors for appellants: *Maddison, Stirling, Hamm & Davies.*

Solicitors for respondents: *Gard, Rook & Co.*

J. C.  
1910  
WHITE  
r.  
VICTORIA  
LUMBER  
AND  
MANU-  
FACTURING  
COMPANY,  
LIMITED.

[PRIVY COUNCIL.]

J. C.\*  
1910  
July 14, 15,  
29.

JAMES T. BURCHELL . . . . .  
  
AND  
GOWRIE AND BLOCKHOUSE COLLIERIES, }  
LIMITED . . . . . }

PLAINTIFF;  
  
  
DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

*Principal and Agent—Commission on Sale of Mining Property—Sale completed on Terms disapproved by Agent—Agent the efficient Cause of the Sale effected.*

In an action by the appellant to recover an agreed commission on the proceeds of a sale of mining property by the respondent company the latter contended that he was not the efficient cause of the particular sale effected :—  
*Held*, that as the appellant had brought the company into relation with the actual purchaser he was entitled to recover although the company had sold behind his back on terms which he had advised them not to accept.

APPEAL by special leave from a judgment of the Supreme Court (October 5, 1909) affirming a judgment of the Supreme Court of Nova Scotia (January 23, 1909) which had reversed a judgment of the official referee to whom the case had been referred by consent.

By an agreement dated February 27, 1907, and made between the chairman of the respondent company and C. O. Macdonald and F. B. McCurdy, it was agreed, subject to ratification of the agreement by the respondents, that all the property of the respondents should be transferred to Macdonald and McCurdy, with a view to its being incorporated with the property of the North Atlantic Collieries, Limited, in consideration of certain amounts of mortgage bonds, preferred stock, and ordinary shares of the North Atlantic Collieries, Limited, and \$12,500 was to be provided in cash for payment of the respondents' Canadian debts. This transaction was duly carried out, the benefit of the agreement having been on June 1, 1907, purchased by the Canada

\* *Present*: LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MERSEY.

Corporations, Limited, subject to certain slight modifications not material for present purposes.

The question decided was whether the appellant became entitled under the circumstances detailed in their Lordships' judgment to commission at the rate of 10 per cent. in respect of such transaction.

On July 16, 1907, the appellant sued to recover the sum of \$111,200, being 10 per cent. on the par value of the above stock and bonds and also 10 per cent. on the said \$12,500.

The respondents contended (a) that the transaction whereby the respondent company parted with its property to the North Atlantic Collieries, Limited, was not a sale, but a barter or merger, and that as the appellant had been employed to negotiate a sale, he was not entitled to commission on a barter or merger; (b) that the transaction was not the direct result of the appellant's agency because the appellant, being of opinion that the terms on which the transaction was carried out were not sufficiently advantageous to the respondent company, had advised the company not to accept them; (c) that the transaction was the direct result of the efforts of the said Mr. Macdonald.

On April 6, 1908, the official referee decided in favour of the appellant on the ground that he had first introduced the respondent company to the ultimate purchasers of its property and induced them to purchase the property by his knowledge, exertions, ability, and skill.

On January 23, 1909, the Supreme Court of Nova Scotia allowed the appeal and dismissed the suit.

Meagher J. was of opinion that the transaction was an amalgamation or merger and not a sale, and, further, that in any event the sale, if it was a sale, could not be said to have been brought about by the appellant, because he had advised the respondent company not to accept the terms which were ultimately accepted. Longley J. was of opinion that the respondent company could always have sold their property for bonds, and that therefore the appellant's intervention was unnecessary. Laurence J. held that the appellant's authority was restricted to a sale for \$325,000 in cash and \$300,000 in bonds, and that, as the appellant had not effected a sale on those terms when the

J. C.

1910

BURCHELL

v.

GOWRIE

AND

BLOCKHOUSE  
COLLIERIES,  
LIMITED.



J. C.  
1910  
BURCHELL  
v.  
GOWRIE  
AND  
BLOCKHOUSE  
COLLIERIES,  
LIMITED.

respondent company intervened and sold the property itself, the appellant was not entitled to any remuneration. Drysdale J. was of opinion that it was scarcely open to controversy that the relation of buyer and seller was really brought about by the act of the appellant, and accordingly dissented in favour of the appellant.

The Supreme Court of Canada dismissed the appellant's appeal from this judgment, holding that the appellant's authority was limited to a sale for a stated consideration, of which at least the sum of \$325,000 should be payable in cash, and the appellant not having procured such a purchase, he was not entitled to any commission, and the respondents were within their rights in treating his limited mandate as terminated. It also held that although the appellant's efforts with Pearson, who was a director and principal shareholder in the North Atlantic Collieries, Limited, might possibly have been a *causa sine qua non* of the disposition eventually made of the respondent's property, they were not the efficient cause.

*C. A. Russell, K.C.*; and *Geoffrey Lawrence (Burchell, K.C., with them)*, for the appellant, contended that he was employed by the respondents to find a purchaser and that he did so, to the extent that the relationship of buyer and seller between the respondents and the North Atlantic Collieries, Limited, was brought about by his exertions. The company sold to a purchaser introduced by the appellant. His authority to sell was a continuing one and was never determined. The respondent company could not sell behind his back to a purchaser introduced by him and then claim to be exempted from liability for commission because it sold at a lower price than he had advised and was authorized to accept. Reference was made to *Toulmin v. Millar*. (1)

*Eldon Bankes, K.C.*, and *Rowlatt*, for the respondents, contended that the appellant was not entitled to commission. The transaction as carried out was not such as he was employed or promised a commission for bringing about. The evidence shewed that he did not effectuate or endeavour to carry out the transaction as ultimately completed. It was not the result of his exertions,

(1) (1887) 58 L. T. 96.

but was negotiated and brought about by Macdonald quite independently of him. In any event there was no promise to pay an exorbitant commission of 10 per cent. applicable to such a transaction as was effected, but only a reasonable commission which should be ascertained on a quantum meruit.

*G. Lawrence* in reply.

The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal by special leave from a judgment of the Supreme Court of Canada, dated October 5, 1909.

By that judgment the Supreme Court affirmed by a majority a judgment of the Supreme Court of Nova Scotia in banco, dated January 23, 1909, which by a majority reversed a judgment of the official referee dated April 6, 1908, to whom the case had been referred by an order of the Supreme Court of Nova Scotia made on consent.

The appellant is a mining engineer residing at the town of Sydney, in Cape Breton Island, in the province of Nova Scotia, and has been for the past twenty-five years engaged in the coal-mining business in Cape Breton Island.

The respondent company is a company registered under the Companies Acts in England and is now in voluntary liquidation. All its directors live in England.

The appellant was employed by the respondent company to sell its property in Cape Breton Island on commission, and the question raised by this appeal is whether the appellant is entitled to his commission on the sale of the said property under the circumstances hereinafter mentioned.

The facts are substantially admitted.

In the year 1901 the respondent company was the owner of certain submarine coal areas at Port Morien, off the coast of Cape Breton Island, called the Gowrie Blockhouse Collieries.

The appellant was manager of property for the company, having been in the month of February, 1902, appointed to that position in succession to a Mr. Macdonald. He went immediately after his appointment to reside at a place called Sydney, about twenty miles from Port Morien, and proceeded to develop the mine. Other subaqueous coal seams abutted upon or lay near

J. C.

1910

BURCHELL

v.

GOWRIE

AND

BLOCKHOUSE  
COLLIERIES,  
LIMITED.

1910

July 29.

J. C.  
1910  
—  
BURCHELL  
v.  
GOWRIE  
AND  
BLOCKHOUSE  
COLLIERIES,  
LIMITED.  
—

the mines of the respondents. In the year 1903 a company named the North Atlantic Collieries, Limited, was formed to acquire and work these latter. Of this company a gentleman named the Hon. B. F. Pearson, a successful company promoter, was the leading spirit. The respondents had expended a large sum of money, amounting up to May, 1902, to 64,000*l.*, in acquiring and developing the Port Morien mine. In the year 1905 they were in great financial difficulties, were unable to raise money to continue the work further, and were apprehensive that to stop working the mine and shut it down would diminish its selling value. They determined accordingly to sell it, and with that view their chairman, Mr. Lindsay, on August 15, 1905, wrote to the appellant a letter containing the following passages:—

“ You asked me some time ago if I would be prepared to sell, and my object in writing the present is to say that I am authorised to instruct you to make a sale on the following conditions:—125,000*l.* with 3 per cent. commission to you. In case of need 120,000*l.* less 2½ per cent. commission to you. I realise that we are not able to spend sufficient additional capital on this undertaking to make it the success it deserves, and I hope you will manage to find a buyer for me. . . .

“ I hope you will manage to find a buyer, as I am beginning to be very much inconvenienced at having such a large sum locked up in the colliery on which I am getting no interest.”

Mr. Lindsay went on to suggest the names of three different persons and one company as possible purchasers. The name of Mr. Pearson or of the North Atlantic Collieries was not amongst them.

On August 30 following Lindsay wrote to the appellant a letter containing the following passage:—“ I am not able further to stand the drain [*sic*] of this worry of finding further monies, and in order that you might have a chance of tempting a buyer I have cabled you that in case of need you could agree 105,000*l.*”

The appellant looked around to find a purchaser, but without success. He wrote many letters to Mr. Lindsay urging him to send money to keep the mine open, while Lindsay wrote to him urging him to endeavour to sell it. On September 14 the latter

writes to the appellant: "I am really in a tight corner, and don't know where to turn, so that I hope it will be quite possible with your assistance to find a buyer for the property. I am prepared to make a considerable sacrifice, as I feel my health will not stand the strain of this burden much longer."

The appellant met Mr. Pearson, whether by accident or by arrangement does not matter. He brought Pearson over the respondents' mine, shewed him the workings, and pointed out that he had discovered in his development work that the best way of approaching the subaqueous coal beds of the North Atlantic Collieries was by working through the mine of the respondents at the South Head instead of from the North Head, as had been previously contemplated by Pearson and his company. Pearson was apparently convinced of the superiority of the suggested means of approach. They spent the day together, when Burchell informed him that he (Burchell) had authority to sell the mine, at the same time stating the terms.

On December 17, 1905, Burchell telegraphed to the respondents: "Prospects good selling property. Promise three months. Do you authorise? In the meantime must have funds. Quick action is imperative."

And on the following day he wrote a letter to Lindsay containing the following passage:—"The proposed purchasers this time are the owners of the MacDonald property, South Head. . . . B. F. Pearson is the ablest promoter we have in Canada. . . . I would like to be in a position to give him our terms. As I understand from our conversation and correspondence, your best figures are 105,000*l.*, and if necessary half of this you would be willing to take in stock and half cash. Of course I will get as much as possible, but I want your lowest offer, and it may be they would prefer to buy outright without giving any stock. But you must put me in a position to act promptly."

On December 21 Pearson wrote to the appellant asking for an option to buy this property within three months at the price of \$625,000, on the terms of paying for the option \$5000. This offer was communicated by Burchell to his employers, approved of by them, and accepted by him. The last telegram from Lindsay runs thus: "Both your telegrams received. Agree to

J. C.

1910

BURCHELL

v.

GOWRIE

AND

BLOCKHOUSE  
COLLIERIES,  
LIMITED.



J. C. 1000 times \$625, ten per cent. Commission 1000%, paid immediately. One month option. 'Three.'"

BURCHELL

v.

GOWRIE

AND

BLOCKHOUSE

COLLIERIES,

LIMITED.

This telegram was duly confirmed by letter from Lindsay of December 27. Pearson apparently experienced some difficulty in finding money to carry out this purchase. Burchell went to Halifax to interview him on the subject, and on January 1 wrote to Lindsay a letter containing the following passage :—" So far we are talking cash, but if they have a difficulty in securing all the money we must be in a position to take part stock in a company they are forming."

Many communications subsequently passed and many interviews took place between Pearson and Burchell.

In the latter end of January and beginning of February, 1906, Burchell spent a week at Halifax engaged in negotiating with Pearson a modification of the terms of payment for the respondents' mines, payment in cash having been found impossible. In his letter of February 5, 1906, to Lindsay, Burchell set forth the proposed changes in the following passage :—" They want that we should take half stock, or rather bonds, in a new company that is being formed. As far as we have gone, it is like this, \$325,000.00 cash as follows :—\$5000 to be paid for thirty days' option. At the end of thirty days \$45,000 to be paid on purchase and \$50,000 every sixty days until the full amount of \$325,000 is paid. Balance of purchase-money to be taken in stock or bonds at market value, or purchasers to have the option of substituting a smaller amount of cash in place of bonds. This latter payment may possibly have to be changed after the expert arrives, but if there is any change in these values it will have to be in the latter payment, as I am insisting on \$325,000 cash. All this will probably have to be arranged by cable, as I hope to have it fixed before you can receive this letter, which should leave Halifax by to-morrow night's mail. Of course, if we make these alterations, the sale will be subject to the same commission as sanctioned by you in our previous agreement. I have every reason to believe that the purchase will go through, and am making every effort in your interest to complete a satisfactory sale."

The thirty days' option was changed to sixty, and with this

alteration Pearson's offer was accepted. The letter of Lindsay to Burchell in reference to the matter is most significant. It runs thus :

" Newcastle-on-Tyne,  
20th February, 1906.

J. C.  
1910  
BURCHELL  
"."  
GOWRIE  
AND  
BLOCKHOUSE  
COLLIERIES,  
LIMITED.

" We are in receipt of your two favours of the 5th instant, and have also exchanged telegrams with you as to varying the terms of agreement of sale of the colliery.

" We have agreed to the terms of your letter of 5th instant, with the exception that 60 days' option (from the 5th instant) is substituted for the 30 days, and we stipulated that \$5000 should be paid at once, and that the remaining \$300,000, after deducting \$325,000 to be paid in cash, should be paid by bonds of the new company. We are glad to have your cablegram announcing that the buyers have paid the \$5000 deposit, and that you have arranged us fully on the 16th instant.

" We trust that you have arranged that the commission payable shall be paid by cash and bonds in proportion to the amount of each received by the company. We would rather have the entire amount of \$625,000 in cash, and would be willing to concede a discount (in case of need) up to 10 per cent. on the \$300,000, and probably it may suit the buyers to fall in with this proposal."

This option was in consideration of \$10,000 extended to May 16, 1906, but ultimately fell through like the previous one. Burchell, however, insisted upon being paid, and was paid his commission of 10 per cent. on the sum forfeited under both. On May 22, 1906, Lindsay wrote to Burchell a letter in which the following passage occurs:—"of course we are now free to dispose of the property elsewhere should another opportunity offer, this however at the moment we don't anticipate." Things dragged on. On August 17, 1906, Lindsay wrote to Burchell a letter in which the following passage occurs:—"From our letters received ere this you will have seen that we are leaving the matter of the sale of the colliery in the hands of Pearson and yourself. Sir Montague Allan won't pay anything for options, and we think with you that Pearson has the most feasible scheme."

J. C.        The negotiations with Pearson, however, were continued. A  
1910        Mr. Richardson, a mining engineer, was on December 28,  
BURCHELL       1906, sent out by the respondents to inspect the mine and  
v.        report for the information of the shareholders. Pearson became  
GOWRIE       aware of his arrival, and on January 17, 1907, wrote to  
AND       Burchell that it would be well for Richardson to consider "the  
BLOCKHOUSE       advisability of an amalgamation with the North Atlantic  
COLLIERIES,       Collieries and make a larger deal." On January 21 Burchell  
LIMITED.       wrote to Lindsay that Richardson had thoroughly inspected the  
mine, and that he would bring Pearson and him together and  
talk over the situation, and on February 8, 1907, Lindsay  
wrote to Burchell informing him that "we [the company] hope  
Mr. Richardson may have seen Mr. Pearson and have some-  
thing definite to tell us as to this gentleman's prospects of being  
able to sell [presumably buy] the mine."

Richardson while in Canada came into contact with Macdonald,  
now become a director of the North Atlantic Collieries Company,  
and a Mr. McCurdy, the son-in-law of Pearson. They crossed  
to England in the same ship.

On February 27, 1907, Lindsay, on behalf of the respondents,  
behind the back and without the knowledge of Burchell, entered  
into an agreement with Macdonald and McCurdy (described as  
the grantees) to sell to them the Port Morien mines for the  
following considerations:—\$300,000, par value, first mortgage 6  
per cent. bonds of North Atlantic Collieries, Limited, \$350,000  
preferred 7 per cent. stock of the same company, and \$450,000  
common stock of the same company. The grantees to pay the  
defendant company's debts amounting to \$12,500.

Before Macdonald came over to England he had been brought  
into privy with the negotiations between Burchell and Pearson.  
Discussion had taken place between McCurdy and Pearson and  
him as to the merger of the North Atlantic Collieries, the Gowrie  
and Blockhouse, and the Cape Breton and Broughton Company,  
and before Macdonald left for England with McCurdy, Pearson  
had given him an option of his (Pearson's) interest to enable the  
former to carry through the arrangement for amalgamation, as  
it is called, which Macdonald contemplated endeavouring to  
negotiate with the respondents. It is impossible to contend, in

the face of the telegrams which passed between McCurdy and Macdonald and Pearson on February 26 and 27, 1907, that Pearson was not the dominating personality in the negotiations which culminated in the agreement of February 27, 1907. Everything was done with his privity and consent. His consent was, indeed, apparently considered to be essential. Macdonald and McCurdy were but Pearson's agents or co-adventurers in the transaction, and the common object of each and all of them was to secure for the company in which they were all interested—the North Atlantic Collieries—the special benefits and advantage which Burchell had shewn Pearson the ownership of the respondents' mine would confer.

In that condition of things the appellant brought his action, claiming in his writ of summons \$111,200 damages for breach of contract, and in the alternative one-tenth of each class of the securities which formed the consideration for the sale, and \$1200 cash, one-tenth of the cash given. In a second alternative he asked for a declaration that he was entitled to these latter things. No pleadings were delivered, but by consent it was ordered by the Court that the whole of the cause should be tried before the official referee, who should have all the powers of certifying and amending of a judge of the Supreme Court, and should direct judgment to be entered and otherwise deal with the whole action pursuant to Order xxxiv. of the Rules of the Supreme Court.

It was admitted before the referee that by deed dated June 27, 1907, the respondents' mine was conveyed to the North Atlantic Collieries, Limited. It was not contended before their Lordships, as it was at the trial in the Courts below, that no "sale" of the respondents' property had taken place. That point, which was quite untenable, was most properly abandoned by the respondents' counsel; but the finding and judgment of the referee was impeached on two grounds—(1.) that the acts of the appellant, Burchell, were not an "efficient" cause of the particular sale which in fact took place; and (2.) that even if they were such a cause, and he was entitled to some damages, or some commission on a quantum meruit, he was not entitled to the full commission awarded.

J. C.  
1910  
BURCHELL  
v.  
GOWRIE  
AND  
BLOCKHOUSE  
COLLIERIES,  
LIMITED.



J. C.  
1910  
BURCHELL  
v.  
GOWRIE  
AND  
BLOCKHOUSE  
COLLIERIES,  
LIMITED.

There was no dispute about the law applicable to the first question. It was admitted that, in the words of Erle C.J. in *Green v. Bartlett* (1), "if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him." Or in the words of the later authorities, the plaintiff must shew that some act of his was the *causa causans* of the sale (*Tribe v. Taylor* (2)), or was an efficient cause of the sale (*Millar v. Radford* (3)).

Upon the question of fact, however, whether the acts of the appellant were in this case an efficient cause of the actual sale, much reliance was placed upon the contents of two letters of the appellant dated March 1 and 21, 1907, respectively. In the first of these, after cautioning his principals against having anything to do with Macdonald and McCurdy and the suggested amalgamation, he wrote: "I have resisted every effort of my friend Mr. Pearson to allow your property to be drawn into this alliance on any terms other than a cash basis, and even then I would not tie the property up to these people unless they were prepared to pay a reasonable forfeit. Failing with me I suppose they are now trying to work direct with you." And in the second of these letters, written after Burchell had become aware of the deal which had taken place, he wrote as follows: "As I wrote you, these people's proposals that have been made to you had been offered to me repeatedly, and seeing that I turned them down on every occasion they sought to work direct, and I should judge by your letter with some success."

In reference to these passages it was contended (1.) that the appellant should not have taken it upon himself to "turn down" these proposals, but should have communicated them to his principals, and (2.) that the acts of an agent cannot be held to be the efficient cause of a sale which he has in fact opposed.

The answer to the first contention is that there is not a suggestion from beginning to end of this long correspondence that less than one half of the consideration for the sale of the

(1) (1863) 14 C. B. (N.S.) 681. (2) (1876) 1 C. P. D. 505, 510.

(3) (1903) 19 Times L. R. 575.

mine should be paid in cash. On the contrary, ready money, at least, to that amount was the great desideratum. The lowest price which Lindsay would in December, 1905, consent to take was, as appears from the correspondence, \$105,000, half in cash and half in stock.

In September, 1906, he informed Burchell that he had rejected Sir H. Montague Allan's proposals, and that his (Lindsay's) "directors did not see their way to join any scheme which did not provide for part of the purchase-money being paid in cash."

Their Lordships do not think that any duty lay upon an agent, such as Burchell was, to communicate to his principals proposals which those principals had theretofore in effect informed him could not and would not be accepted.

The answer to the second contention is, that if an agent such as Burchell was brings a person into relation with his principal as an intending purchaser, the agent has done the most effective, and, possibly, the most laborious and expensive, part of his work, and that if the principal takes advantage of that work, and, behind the back of the agent and unknown to him, sells to the purchaser thus brought into touch with him on terms which the agent theretofore advised the principal not to accept, the agent's act may still well be the effective cause of the sale.

There can be no real difference between such a case and those cases where the principal sells to the purchaser introduced by the agent at a price below the limit given to the agent.

Pearson acting with his associates in the interests of the North Atlantic Collieries was the purchaser introduced. Pearson with his co-adventurers acting in the same interest was the actual purchaser, in fact nothing was in reality altered but the consideration to be paid. Stock was to be given in a larger proportion than Burchell was authorized to accept. In all other respects the sale made and the sale authorized to be made by Burchell were in effect the same.

On this question of fact there was, their Lordships think, ample evidence to sustain the conclusion at which the referee presumably arrived, namely, that the appellant's acts were an effective cause of the sale which actually took place. In their

J. C.  
1910  
Burchell  
v.  
Gowrie  
and  
Blockhouse  
Collieries,  
Limited.

J. C. Lordships' view it was the right conclusion, and the finding to that effect ought not, they think, to be disturbed.

1910

BURCHELL  
v.  
GOWRIE  
AND  
BLOCKHOUSE  
COLLIERIES,  
LIMITED.

There only remains the question of damages. The referee found that "the power of sale was a continuing power of sale." By that presumably he meant that the agent's employment was "a general employment" in the sense in which Lord Watson in his judgment in *Toulmin v. Millar* (1) uses those words. This means, however, that Burchell's contract was that should the mine be eventually sold to a purchaser introduced by him, he (Burchell) would be entitled to commission at the stipulated rate, although the price paid should be less than, or different from, the price named to him as a limit. The secret sale deprived him of the benefit of that contract. He lost his chance of earning this commission.

In *Inchbald v. Western Neilgherry Coffee, &c., Co.* (2) Willes J. thus lays down the rule of law applicable to such cases: "I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay, is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it." The negotiations for sale carried on by Burchell extended over two years.

From the correspondence it is clear they cost him much in time and labour, and something in money. It was quite open to the referee to take, as the measure of damages, what would have been Burchell's commission at the stipulated rate, 10 per cent., on the consideration actually received for the sale. This is apparently what he did. In their Lordships' view, therefore, the conclusions at which the referee arrived on the nature and limits of the appellant's employment, as well as on the amount of damages to be awarded, are not only sustainable upon the evidence, but are in themselves right. The appeal, in their opinion, should therefore be allowed, the judgment appealed from reversed, and the judgment of the referee restored. And they will humbly advise His Majesty accordingly. The respondents must pay the costs here, including the costs of the petition

(1) 58 L. T. 96.

(2) (1864) 17 C. B. (N.S.) 733.

for special leave to appeal which were by their Lordships' order reserved, as well as the costs in the Courts below.

Solicitors for appellant: *Hill, Son & Rickards.*

Solicitors for respondents: *Bischoff, Dodgson, Cox, Bompas & Bischoff.*

J. C.  
1910  
BUNCHELL  
v.  
GOWRIE  
AND  
BLOCKHOUSE  
COLLIERIES,  
LIMITED.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC . . . . .	}	APPELLANT;	J. C.* 1910
AND			July 19, 20, 29.
ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO . . . . .	}	RESPONDENT.	
ON APPEAL FROM THE SUPREME COURT OF CANADA.			

*Award as to Accounts of Common School Lands Fund—Can. Cons. Stat., 1859, c. 26—Arbitration under Canada Act 54 & 55 Vict. c. 6, Ontario Act 54 Vict. c. 2, Quebec Act 54 Vict. c. 4—Jurisdiction of Arbitrators—Submission as to Accounts and Destination of Moneys received.*

By s. 9 of the award dated September 3, 1870, made in pursuance of the British North America Act, 1867, s. 142, it was directed that all moneys received by the Province of Ontario since June 30, 1867, from the school lands set apart by Canadian statutes (consolidated by Can. Cons. Stat., 1859, c. 26) and called the common school fund should be paid to the Dominion, and that the income derived therefrom should be paid to the Provinces of Ontario and Quebec in the proportions specified in s. 5 of that statute.

On April 10, 1893, the three Governments of the Dominion, Ontario, and Quebec entered under statutory authority into an agreement of submission as to matters in difference in the settlement of accounts between them under the award of 1870, and for the ascertainment and distribution of the said school fund. Thereunder Quebec claimed that certain moneys, which it was admitted had not been actually received by Ontario, had been constructively received, since they were deductions which Ontario was not authorized to make except at her own expense, and should be the subject of distribution between them:—

*Held*, that the Supreme Court was right in affirming an award to the effect that the arbitrators had no jurisdiction. Moneys actually received by Ontario were alone the subject of the submission, the terms of which

\* *Present*: LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MERSEY.



J. C.

could not be extended so as to force a contribution from a larger constructive receipt.

1910

*Attorney-General for Ontario v. Attorney-General for Quebec*, [1903]

PROVINCE OF  
QUEBEC

A. C. 39, followed.

v.

PROVINCE OF  
ONTARIO.

APPEAL by special leave from a judgment of the Supreme Court (May 28, 1909) confirming an award of the arbitrators appointed under three statutes (Canada Act 54 & 55 Vict. c. 6, Ontario Act 54 Vict. c. 2, Quebec Act 54 Vict. c. 4) to settle certain disputed questions between the Dominion and the Provinces of Ontario and Quebec.

By these three statutes, which are practically identical in their terms, it was provided that certain questions that had arisen or might arise in the settlement of the accounts between the Dominion of Canada and the Provinces of Ontario and Quebec might be referred by the three Governments to arbitration for final determination. There were to be three arbitrators, any two of whom should have power to make an award. They should not be bound to decide according to strict rules of law, but might decide on equitable principles; and when they proceeded on their view of a disputed question of law, the award should set forth the same and be subject to appeal, so far as relates to such decision, to the Supreme Court, and thence to the Privy Council.

On April 10, 1893, submission was made by the three Governments to three arbitrators appointed under the said statutes. The matters referred so far as material were:

“1. All questions relating to or incident to the accounts between the Dominion and the Provinces of Ontario and Quebec, and to accounts between the two Provinces of Ontario and Quebec.

“2. These accounts are understood to include the following particulars. . . . :

“(f) All other matters of account . . . (3.) between the two provinces.

“3. It is further agreed that the following matters shall be referred . . . . :

“(h) The ascertainment and determination of the amount of the principal of the common school fund . . . .

“(i) In the ascertainment of the amount of the principal of

the said common school fund, the arbitrators are to take into consideration not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable . . . .

J. C.

1910

PROVINCE OF  
QUEBEC

v.

PROVINCE OF  
ONTARIO.

"4. All the accounts . . . . shall be brought down and extended to 31st December, 1892."

Several awards were made by the arbitrators, including common school fund awards No. 2 and No. 4, rendered on March 6, 1896, and October 21, 1899, in addition to the award the subject of this appeal. The common school fund is the subject of Canadian Acts 4 & 5 Vict. c. 18, 7 Vict. c. 9, 12 Vict. c. 200, and 16 Vict. c. 159, consolidated by Cons. Stat. Can., 1859, c. 26. Lands were set apart and appropriated thereunder with a view to the formation of the fund, and all these lands were situated in Ontario. Under British North America Act, 1867, s. 107, these lands became vested in Ontario subject to "any trusts existing in respect thereof and to any interest other than that of the province in the same." An arbitration provided by s. 142 of that Act resulted in the award of September 3, 1870, under which the school fund was held by the Dominion on terms that the income would be paid over to Ontario and Quebec in the proportions determined by the statute of 1859, and that all moneys received or to be received by Ontario from or on account of the common school lands would be paid to the Dominion to be dealt with by it as part of the fund.

Under the submission of April 10, 1893, Quebec claimed that the accounts furnished by Ontario should be corrected in respect of certain remissions and deductions made from the total sums, principal and interest, which she ought to have collected on behalf of the fund. It denied the validity so far as Quebec was concerned of the Ontario statutes which purported to authorize them. Ontario defended them as made in the interests of both provinces. The awards Nos. 2 and 4 held Ontario liable for sums of purchase-money forgiven or remitted or uncollected from the purchasers of common school lands. But the decision in [1903] A. C. 39 was to the effect that a claim against Ontario of that nature based upon breach of trust and seeking relief on that footing was not within the terms of the said submission. The

J. C. award appealed from and dated January 6, 1908, declared that the  
 1910 provisions of the awards Nos. 2 and 4 which granted relief on  
 PROVINCE OF that footing were in excess of the jurisdiction of the arbitrators,  
 QUEBEC and that no effect should be given to them, and that they could  
 v. not proceed further on the question as to the reductions com-  
 PROVINCE OF plained of. Quebec appealed to the Supreme Court, which on  
 ONTARIO. May 28, 1909, affirmed the holding of the arbitrators (the Chief  
 Justice and Duff J. dissenting): see 42 S. C. R. 161. The majority  
 considered that the question of jurisdiction was concluded by  
 the decision in the *Uncollected Balances Case*. (1)

*Lapleur, K.C.*, and *Geoffrion, K.C.*, for the appellant, contended that the claim arising in the present case was clearly distinguishable from the claim in the *Uncollected Balances Case*. (1) It was not based upon any breach of trust or any wilful neglect or default by Ontario. The present claim admitted the right of Ontario to make the remissions, but claimed that she should do so at her own expense and so as to affect only Ontario's share in the proceeds and not that of Quebec. Quebec asked that the accounts should be corrected so as to shew the amounts remitted. It did not seek that Ontario should be charged with sums which but for breach of trust it might have received. It sought that the Dominion should hold the fund which it had actually received and was then in its possession on behalf of the two provinces in such manner as to debit Ontario with remissions made out of its share, unless the remissions could be shewn to have been made in a fair and prudent administration. It contended that, if the remissions had not been made so as to affect Quebec's share of the fund, it ought to be held that there was constructive receipt by Ontario of the amount remitted, because Ontario parted with the properties and must be deemed as between the two provinces to have received the purchase-money. The distinction between this case and the *Uncollected Balances Case* (1) was that it sought merely a declaration of trust in reference to a fund actually or constructively in existence, and did not ask that that fund should be augmented by moneys which but for wilful neglect and default might have been received.

(1) [1903] A. C. 39.

*C. H. Ritchie, K.C.*, and *Shepley, K.C.*, for the respondent,  
were not heard.

*Newcombe, K.C.*, for the Dominion of Canada.

J. C.

1910

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 PROVINCE OF  
QUEBEC

v.

 PROVINCE OF  
ONTARIO.

1910

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 July 29.
 

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The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. The question in this case arises under an arbitration between the Dominion of Canada, the Province of Ontario, and the Province of Quebec, pursuant to the statute of Canada 54 & 55 Vict. c. 6, the statute of Ontario 54 Vict. c. 2, and the statute of Quebec 54 Vict. c. 4. These three statutes are in the same terms and provide that questions arising on the settlement of accounts between the Dominion and the two provinces named may be referred to arbitration for final determination.

The present appeal is from a judgment of the Supreme Court of Canada, dated May 28, 1909, confirming an award of the arbitrators appointed under the authority of the three Colonial Acts above mentioned. The award appealed from had itself adjudged that certain findings and directions of two previous awards of the arbitrators were in excess of their jurisdiction, and that no effect should be given to them. This situation, at least partly, arose in consequence of the application to their proceedings of the principle set forth in the case of *Attorney-General for Ontario v. Attorney-General for Quebec*, reported in [1903] A. C. 39. The majority of the judges of the Supreme Court held that the decision just cited was applicable to the circumstances and ruled the proceedings of the present arbitration; and they accordingly confirmed the award of the arbitrators which had been based on the same ground.

In the year 1859 an important statute was passed in Canada for the regulation of the administration of the revenues arising from a large and important public educational endowment, "the Commissioner of Crown Lands having, under the provisions of the Act 12 Vict. c. 200, and under the direction of the Governor in Council, set apart and appropriated one million acres of public lands for common school purposes." Directions as to the appropriation of revenue and the accumulation of a common school fund until it is sufficient to produce a revenue of \$400,000 per annum, together with other administrative provisions, are



J. C.  
1910  
PROVINCE OF  
QUEBEC  
v.  
PROVINCE OF  
ONTARIO.

contained in the Act. The question in the present case has reference to the shares of this common school fund to which the Provinces of Ontario and Quebec respectively are entitled.

The Canadian Confederation took place on July 1, 1867; and by the British North America Act of that year, s. 142, it was enacted that the division and adjustment of the debts, credits, liabilities, property, and assets of Upper Canada and Lower Canada were to be referred to the arbitrament of three arbitrators.

These arbitrators duly appointed under the Act made their award on September 3, 1870. This document is one of the most important public documents regulating inter-provincial rights in the Dominion of Canada. And in the opinion of their Lordships its terms provide the radical element for the consideration and settlement of the dispute in the present case.

It should be premised that the lands which had been set apart by Government, from whose sale and realization the common school fund was to be built up, were all in Upper Canada and became the property of Ontario at the Confederation, subject to the liability to account and pay over to the Dominion of Canada and to the apportionment between Ontario and Quebec. As stated, it is upon the point of that apportionment that Quebec in the present cause has challenged the proceedings of the Province of Ontario.

The fundamental provision of the award is s. 9, which provides that "the moneys received by the said Province of Ontario since the 30th June, 1867, or which shall hereafter be received by the said province from or on account of the common school lands set apart in aid of the common schools of the late Province of Canada, shall be paid to the Dominion of Canada . . . and the income derived therefrom shall be apportioned and paid between and to the said Provinces of Ontario and Quebec" in certain proportions; and provision is made for an allowance of 6 per cent. to Ontario for collection.

So far as the management and ingathering of this fund is concerned, two things are plain. In the first place, Ontario as a province was not unnaturally selected as the administrator of the lands,—no doubt for the reasons that the proprietary rights therein being in that province and the situation of the lands

being also there, presumably Ontario could administer with all the advantages of local knowledge. In the second place, Ontario as a province was itself deeply interested in correct administration, not only on account of its direct liability to the Dominion Government, but of its individual right to its share in the apportionment and division. These circumstances are not without a bearing upon those arguments used by the appellant in this case, which are founded upon the strictest principles of trust accounting.

J. C.  
1910  
PROVINCE OF  
QUEBEC  
v.  
PROVINCE OF  
ONTARIO.

In the year 1891 the Provinces of Ontario and Quebec made what is pleaded to be a legislative contract (under the Acts referred to) for the reference to arbitrators of matters in difference between them. Following thereon, on April 10, 1893, the Dominion Government and the two provinces entered into an agreement of submission which narrated the previous legislation. This agreement of submission was the document which fell to be construed in the previous case before the Privy Council between the two provinces. As already stated, the whole of the provisions of this agreement appear to be executive of the award of 1870, defining what was the common school fund, its destination, distribution, &c. In their Lordships' opinion, the agreement is not, and was not really intended to be, wider in its terms and effect than the award.

Now, as mentioned above, it is fundamental in the matter of accounting that what Ontario is to account for is "moneys received." It has transpired that, in the course of the development of the province, Ontario,—pleading that it has been administering in the best interests of the Colony and of the settlers,—has made certain deductions and remissions from the amounts due by them under their original contracts for purchase of land. Quebec challenges these deductions and remissions, and maintains that, if made, they must form an abatement from Ontario's own share of the fund, but cannot enter into the account as being in any respect a debit falling upon the share due to Quebec.

In their Lordships' opinion, a controversy of this nature has reference to the administration which preceded the receipt or possible receipt of funds, and is of the nature of a challenge of

J. C. that administration, but is not a matter of arbitration as to the  
1910 distribution of "moneys received."

PROVINCE OF QUEBEC  
v.  
PROVINCE OF ONTARIO.  
— Further, it cannot be said that the questions raised on this  
appeal were not before the Privy Council on the occasion  
mentioned. If it were possible to put in a few sentences the  
clear and cogent argument addressed to the Board by Mr. Lafleur,  
those sentences would be found in the condensed report of the  
argument for Quebec presented in the former case. These are  
that counsel "for the respondent contended that, by reason of  
Ontario's neglect or omission to collect purchase-moneys, the  
common school fund had been largely diminished. Accordingly,  
in the settlement of accounts referred between the two provinces,  
and as a question arising out of or relating or incident to the  
settlement of those accounts, the arbitrators had jurisdiction to  
deal with Quebec's claims. The terms of the reference were  
wide enough in their scope to confer it; and the arbitrators were  
bound to take into consideration, not only the amount of the  
common school fund actually in hand, but also 'the amount for  
which Ontario was liable,' words which were not limited in their  
meaning to moneys actually received."

The same argument is presented. But it has, of course, to be  
noted that the actual point of accounting in the former case was  
as to the uncollected prices of lands sold by Ontario, which  
prices ought to have been, but had not been, collected. Upon  
this Lord Robertson remarked: "Now, the substance of the  
claim of Quebec is that the Ontario Government is to be  
debited with what in fact is not in their hands, and is alleged to  
be uncollected owing to the fault of that Government. Their  
Lordships are unable to hold that a claim of this nature is to be  
found within the language of articles (h) and (i) of the submission  
when there is no recital or suggestion of it in the rest of the  
submission. The question is not whether the claim is suitable  
for arbitration, but whether it has been submitted by this  
instrument. As their Lordships read the claim, it is a claim  
founded on wilful neglect and default and of the nature of  
damages, and is heterogeneous to the questions which are clearly  
included in the submission. The specified matters which the  
arbitrators are to take into consideration do not include the

present claim, and the fact that they are mentioned makes it impossible to suppose that the parties would have omitted to mention the matter now in question, if it had been within the scope of the reference."

J. C.

1910

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 PROVINCE OF  
QUEBEC

v.

 PROVINCE OF  
ONTARIO.
 

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The question in the present case is whether, when the claim of Quebec is examined, it does not fall to be ruled by the principles laid down in this judgment. It is an admitted fact in the case that Ontario has not received the moneys. Failing actual receipt, however, Quebec puts forward the contention that the accounting should proceed upon the footing of constructive receipt, because,—so runs the argument—unless each individual remission and deduction can be justified by evidence, Quebec is entitled to maintain that Ontario must be treated as liable to account for the moneys due under the original contracts with the settlers. It is unnecessary to make a pronouncement upon this now, for it appears to their Lordships, to use the language of Anglin J., that "No other ground has been suggested upon which it could be held that these moneys not actually received by Ontario should be treated as having been constructively received. Unless actual or constructive receipt of the moneys is established, any claim that Ontario should account for them as if they had been so received must be a claim 'founded on wilful neglect or default and in the nature of damages,' and as such not within the scope of the reference."

To which may be added Idington J.'s observation: "Nor can I see how the grant of titles to the purchasers thus relieved from payment can convert the legal wrong as regards the appellant, if any, into anything but wilful default."

Ontario's conduct is wilful; it maintains the high expediency of the course which it has pursued, and accordingly the moneys have not been received by it,—on account of what is maintained by it to have been sound public administration. Whether this be so or not it is not for their Lordships to determine, nor, in their opinion, was it for the arbitrators to do so. They hold that their judgment here falls to be ruled by the judgment of Lord Robertson above cited, and that the principles thereof apply to the present situation.

The one fact that is entirely clear is the non-receipt of the



J. C.      moneys. As has been mentioned, the assumption of the original  
1910      award of 1870, which is the fundamental document, was that  
PROVINCE OF      Ontario, which administered and had itself great interest in the  
QUEBEC      receipts, but, on the other hand, was presumably acquainted  
PROVINCE OF      with the circumstances of its own territory, would not deplete its  
ONTARIO.      revenue, but administer for the best for all concerned. If it has  
not done so, it may be for the question to be raised legislatively  
or otherwise; but when in the circumstances described the  
cardinal fact of non-receipt is admitted, it appears to their  
Lordships that the attempt to force a contribution as from a  
larger constructive receipt is simply another way of claiming  
damages—a thing which, first, is not provided for by the original  
award, and, secondly, is ruled out by the decision cited.

Their Lordships will humbly advise His Majesty that the  
appeal should be refused.

There will be no order as to costs.

Solicitors for appellant: *Charles Russell & Co.*

Solicitors for respondent: *Freshfields.*

## [PRIVY COUNCIL.]

DOMINION OF CANADA . . . . .	PLAINTIFF;	J. C.*
	AND	1910
PROVINCE OF ONTARIO . . . . .	DEFENDANT.	July 19, 21, 29.
ON APPEAL FROM THE SUPREME COURT OF CANADA.		

*Law of Canada—Treaty of October 3, 1873, extinguishing the Indian Interest in Lands — Payments by the Dominion under the Treaty—Suit by the Dominion against the Province of Ontario for Contribution as respects Lands within the Province.*

By a treaty dated October 3, 1873, the Dominion Government, acting in the interests of the Dominion as a whole, secured to the Salteaux tribe of the Ojibeway Indians certain payments and other rights, at the same time extinguishing by consent their interest over a large tract of land about 50,000 square miles in extent, the greater part of which was subsequently ascertained to lie within the boundaries of the Province of Ontario. It having been decided that the release of the Indian interest effected by the treaty enured to the benefit of Ontario, the Dominion Government sued in the Exchequer Court for a declaration that it was entitled to recover from and be paid by the Province of Ontario a proper proportion of annuities and other moneys paid and payable under the treaty:—

*Held*, affirming the judgment of the Supreme Court, that, having regard to the jurisdiction conferred upon the Exchequer Court, the action must be dismissed as unsustainable on any principle of law. In making the treaty, although it resulted in direct advantage to the province, the Dominion Government did not act as agent or trustee for the province or with its consent, or for the benefit of the lands, but with a view to great national interests—that is, for distinct and important interests of their own—in pursuance of powers derived from the British North America Act, 1867.

*St. Catherine's Milling and Lumber Co. v. The Queen*, (1888) 14 App. Cas. 46, considered.

APPEAL by special leave from a judgment of the Supreme Court (February 12, 1909) which reversed a judgment of Burbidge J. in the Exchequer Court of Canada (March 18, 1907) and dismissed the appellant's suit.

The jurisdiction of the Exchequer Court to decide the controversy in suit between the Dominion and the province was

\* *Present*: LORD LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MERSEY.

J. C.      conferred by R. S. C., 1906, c. 140, s. 32, and R. S. O., 1897,  
1910      c. 49, s. 1.

DOMINION OF CANADA  
v.  
PROVINCE OF ONTARIO.  
—

By the statement of the Dominion of Canada filed in the Exchequer Court on June 13, 1903, the claimant set forth that by a treaty No. 3, known as the North West Angle Treaty, and dated October 3, 1873, between Her late Majesty Queen Victoria by her Commissioners therein named of the one part, and the Salteaux tribe of the Ojibeway Indians of the other part, the said Indians ceded, released, surrendered, and yielded up to the Government of the Dominion for Her Majesty the Queen and her successors for ever all their rights, titles, and privileges whatsoever to the lands thereafter mentioned, such lands embracing an area of 55,000 square miles more or less, to hold the same to Her Majesty the Queen and her successors for ever. And Her Majesty the Queen thereby agreed and undertook to lay aside reserves of lands in the territories thereby ceded for the benefit of the Indians as therein mentioned, and further to give to her Indians certain presents of money, and also annually to pay to them certain annuities and to give to them certain presents and sums of money for the chiefs and subordinate officers as therein mentioned. And Her Majesty also entered into further agreements with her said Indians as therein mentioned.

The claimant also set forth that in pursuance of the treaty the Dominion had made payments to and for the benefit of the Indians in accordance with its provisions, the details of which were set out in schedules A and B to the said statement, and that the Dominion had also been obliged to make large expenditures of money in making surveys of reserves for the Indians and in conducting the necessary business of the administration of the treaty, the details of which expenditure were set forth in schedule C thereto. Also that after the admission into the Union of the Province of Manitoba in the year 1870 a dispute arose between the Dominion and the Province of Ontario as to the correct northern and western boundary of the said Province of Ontario, and that, arbitrators having been appointed to determine the correct boundary, an award was made, by the effect of which out of the 55,000 square

miles within the limits of the treaty about 30,000 square miles were found to be within the boundary of the Province of Ontario. Subsequently, in the year 1888, in an action brought by the Attorney-General of Ontario against the St. Catherine's Milling and Lumber Company, Limited, the Judicial Committee of the Privy Council decided that the portion of the ceded lands found by the Court to be within Ontario formed part of the public domain of Ontario, and were public lands belonging to Ontario by virtue of the provisions of the British North America Act, and the claim that the said lands were the property of the Dominion by reason of the cession of the Indian title to the Dominion was dismissed.

J. C.

1910

DOMINION OF  
CANADA  
v.  
PROVINCE OF  
ONTARIO.

The claim of the Dominion of Canada was for a declaration that (1.) inasmuch as the benefit of the aforesaid surrender accrues to Ontario, that province shall relieve the Dominion of all obligations involving the payment of money which were undertaken by Her Majesty by virtue of the said treaty, and which have been, or may be, fulfilled by the Dominion of Canada; (2.) the Province of Ontario has held, and now holds, the portion of the ceded lands which lie within the province charged with and subject to the payment of a proportion of the annuities and other moneys paid to and for the Indians under the terms and stipulations of the treaty; (3.) the Dominion of Canada is entitled to recover from, and be paid by, the Province of Ontario a proper proportion of annuities and other moneys so paid as aforesaid; (4.) all proper accounts be taken to ascertain the amount payable to the Dominion in respect of the said annuities and other moneys so paid as aforesaid.

By its answer the Province of Ontario denied liability, and, further, counterclaimed in respect of certain revenues received by the Dominion pending a determination of the boundaries of the province and arising out of the lands eventually adjudged to belong to the province.

The judgment of the Judicial Committee in *St. Catherine's Milling and Lumber Co. v. The Queen* (1) decided that the surrender of so much of the area of 55,000 square miles as was situated in the Province of Ontario enured to transmit



J. C. to the province in terms of s. 109 of the British North America  
 1910 Act, 1867, the entire beneficial interest in such lands, and  
 DOMINION OF in the course of the judgment there occurred this passage(1):  
 CANADA  
 v.  
 PROVINCE OF "Seeing that the benefit of the surrender accrues to her,  
 ONTARIO. Ontario must of course relieve the Crown and the Dominion of  
 all obligations involving the payment of money which were  
 undertaken by Her Majesty, and which are said to have been in  
 part fulfilled by the Dominion Government."

Burbidge J. by his judgment declared the province liable to pay to the Dominion all such sums paid by the Dominion as were referable to the extinguishment of the Indian title, in the proportion which the area of the treaty lands within Ontario bears to the whole treaty area. All other questions, including the question what sums of money so paid by the Dominion were referable to the extinguishment of the Indian title, were reserved for further consideration and adjudication. He considered that, with respect to that portion of the lands surrendered to the Crown which were situated within the province, "the Dominion Government occupied a position analogous to that of a bona fide possessor or purchaser of lands of which the actual title was in another person. The question of the extinguishment of the Indian title in these lands could not with prudence be deferred until such boundaries were determined. It was necessary to the peace, order, and good government of the country that the question should be settled at the earliest possible time. The Dominion authorities held the view that the lands belonged to the Dominion and that they had a right to administer the same. In this they were in a large measure mistaken, but no doubt the view was held in good faith. They proceeded with the negotiations for the treaty without consulting the province. The latter, although it claimed the lands to be surrendered or the greater part thereof, raised no objection and did not ask to be represented in such negotiations. The case bears some analogy to one in which a person in consequence of unskilful survey or in the belief that the land is his own makes improvements in lands that are not his own. In such a case the statutes of the old Province of Canada made, and those of the Province of

Ontario make, provision to protect him from loss in respect of such improvements or to give him a lien therefor. The case, however, appears to me to bear a closer analogy to one in which a bona fide possessor or purchaser of real estate pays money to discharge an existing incumbrance or charge upon the estate having no notice of any infirmity in his title. In such a case, as stated by Mr. Justice Story in *Bright v. Boyd* (1), the possessor or purchaser was according to the principles of the Roman law entitled to be repaid the amount of such payment by the true owner seeking to recover the estate from him." He also considered that the views expressed in Lord Watson's judgment (2) should be taken as a part or condition of the judgment in favour of the province, and that, although such views found no place in the formal judgment pronounced, it was proper that he should give effect to the view there expressed that the Province of Ontario was liable to indemnify the Dominion against a portion of the expenditure incurred in discharge of the obligations created by the treaty.

J. C.  
1910  
—  
DOMINION OF  
CANADA  
v.  
PROVINCE OF  
ONTARIO.  
—

The judgment on further consideration (December 4, 1907) referred it to the registrar to take certain accounts necessary to give effect to the declaration.

Both judgments were reversed by the Supreme Court by a majority of one (Idington, Maclellan, and Duff JJ., Girouard and Davies JJ. dissenting).

The judgment of the majority dealt first with the scope of the jurisdiction of the Court of Exchequer, to which Court, by identical statutes, the Dominion and the province had committed jurisdiction over controversies between them, and held that the statutes in question required any controversy submitted under them to be determined in accordance with and by the application of legal principles, and not by considerations of mere convenience and propriety.

Idington J. held that there was no foundation in law or fact for the theory that the Dominion acted as an agent for the province, but that the Dominion was impelled to settle with the Indians by virtue of its obligations to the Province of British Columbia, and for other reasons not referable to its wardship

(1) (1841) 1 Story's Reports, 479, 498.

(2) 14 App. Cas. 60.

J. C. over or duties towards such Indians ; and that the pronouncement  
1910 in Lord Watson's judgment in 14 App. Cas. 60 was a mere dictum.  
DOMINION OF Duff J., with whose opinion MacLennan J. concurred, agreed  
CANADA with Idington J. as to the motives of the Dominion in making  
v. the treaty, and considered that under these circumstances there  
PROVINCE OF was no principle on which a Court of Equity could proceed to  
ONTARIO. adjust equitably as between the Dominion and the province the  
burden of the obligations undertaken by the former ; that Lord  
Watson's remark was a mere dictum, the preferable view of its  
import being that, upon the facts as they appeared, as a matter  
of fair dealing Ontario would be expected to assume the obligations  
in question, but that, in deciding controversies between  
the two Governments, the Exchequer Court could only apply  
some appropriate rule or principle of law, and that the pronouncement,  
even if more than a mere dictum, would not be  
conclusive of the appeal before them.

*Newcombe, K.C.*, and *Clauston*, for the appellant, contended that the judgment of *Burbidge J.*, whose decision was upheld by the dissenting judges in the Supreme Court, was right. The case was concluded by the authority of the principle laid down by Lord Watson's judgment in 14 App. Cas. 46. The majority of the Supreme Court recognized that the claim of the Dominion was naturally equitable, and that the province which obtained the benefits of the treaty, so far as it affected the lands in which it had the beneficial interest, should bear the burdens which the treaty imposed thereon. It was unnecessary to resort to any technical rule of law or equity as laid down by authority. It had been a public duty devolving on the Dominion to extinguish the Indian title ; and it discharged that duty for the benefit of all concerned. The resulting burdens should be adjusted in proportion to the benefits accepted. It was contended that the Crown in right of the Dominion represented the union of all the provinces and that payment by the Dominion was payment by all the provinces jointly. If the sole benefit of a particular treaty provision made by the Dominion enured to the exclusive benefit of one province only, the resulting liability should be borne by that province and not shared by the other provinces which did not participate in

the accruing advantages. The principle invoked by the Dominion in this case was that the obligations and liability incurred to obtain the surrender of the Indian title were in effect a commutation of the burden of that title upon the lands, and as such remain a charge upon the lands. In such a case as this no distinction should be drawn between the Crown acting in right of the Dominion and the Crown acting in right of the province. If a distinction can be made, it should be held that the Dominion acted in obtaining the treaty and freeing the lands from the Indian title, so far as regards the lands situated within the province, as agent for the province. The benefits secured by the treaty passed to the province upon the acceptance by the province of the lands surrendered. By that acceptance the province accepted also the liabilities which the treaty created in respect thereof. Even if no principle of municipal law could be found applicable, the case should be governed on such principles of equity and fairness as regulate the respective rights and obligations of distinct and independent States, and by those principles a State accepting advantages under a public treaty must bear the liabilities involved thereby, thus accepting the treaty as a whole. It cannot accept such portion as is in its favour and repudiate the liability which acceptance involves and ratifies. Reference was made to the judgment of Strong C.J. in *Province of Ontario v. Dominion of Canada, In re Indian Claims* (1), and to *Attorney-General for the Dominion v. Attorney-General for Ontario* (2); *Ontario Mining Co. v. Seybold* (3); *Johnson v. McIntosh* (4); *Worcester v. State of Georgia* (5); *Mitchell v. United States*. (6)

C. H. Ritchie, K.C., and Shepley, K.C., for the respondent, were not heard.

The judgment of their Lordships was delivered by

LORD LOREBURN L.C. In this appeal the only question argued was whether or not the Dominion of Canada is entitled to

J. C.

1910

DOMINION OF  
CANADA  
v.  
PROVINCE OF  
ONTARIO.

1910

July 29.

(1) (1895) 25 Can. S. C. R. 434, 543.  
505.

(2) [1897] A. C. 199, 210.

(3) [1903] A. C. 73.

(4) (1823) 8 Wheaton (21 U. S.) 711.

(5) (1832) 6 Peters (31 U. S.)

515.

(6) (1835) 9 Peters (34 U. S.)



J. C. 1910  
DOMINION OF CANADA  
v.  
PROVINCE OF ONTARIO.  
recover from the Province of Ontario a proper proportion of annuities and other moneys which the Dominion bound itself in the name of the Crown to pay to an Indian tribe and its chiefs under a treaty of October 3, 1873. There has been a marked difference of opinion in the Canadian Courts. Burbidge J. decided in favour of the Dominion, but on appeal to the Supreme Court of Canada three out of five learned judges reversed that judgment. The various opinions delivered in both Courts have dealt with the case so exhaustively and so clearly that nothing new really remains to be said, and the matter at issue has been reduced to a simple though extremely important point.

The treaty of 1873 was made between Her late Majesty Queen Victoria, acting on the advice of the Dominion Government, and the Salteaux tribe of the Ojibeway Indians. Its effect was to extinguish by consent the Indian interest over a large tract of land about 50,000 square miles in extent, and in return it secured to the Indians certain payments and other rights agreed to and promised by Her Majesty. At that time it had not been ascertained whether any part of this land was included within the Province of Ontario, but it is now common ground that the greater part of it lies within the Ontario boundaries. In making this treaty the Dominion Government acted upon the rights conferred by the Constitution. They were not acting in concert with the Ontario Government, but on their own responsibility, and it is conceded that the motive was not any special benefit to Ontario, but a motive of policy in the interests of the Dominion as a whole.

When, however, by subsequent decisions it was established that, under the British North America Act of 1867, lands which are released from the overlying Indian interest enure to the benefit, not of the Dominion, but of the province within which they are situated, it became apparent that Ontario had derived an advantage under the treaty. And the principle sought to be enforced by the present appeal is that Ontario should recoup the Dominion for so much of the burden undertaken by the Dominion toward the Salteaux tribe as may properly be attributed to the lands within Ontario which had

been disencumbered of the Indian interest by virtue of the treaty.

J. C.

1910

DOMINION OF  
CANADA  
v.  
PROVINCE OF  
ONTARIO.

Their Lordships are of opinion that in order to succeed the appellants must bring their claim within some recognized legal principle. The Court of Exchequer, to which, by statutes both of the Dominion and the province, a jurisdiction has been committed over controversies between them, did not thereby acquire authority to determine those controversies only according to its own view of what in the circumstances might be thought fair. It may be that, in questions between a dominion comprising various provinces of which the laws are not in all respects identical on the one hand, and a particular province with laws of its own on the other hand, difficulty will arise as to the legal principle which is to be applied. Such conflicts may always arise in the case of States or provinces within a union. But the conflict is between one set of legal principles and another. In the present case it does not appear to their Lordships that the claim of the Dominion can be sustained on any principle of law that can be invoked as applicable.

To begin with, this case ought to be regarded as if what was done by the Crown in 1873 had been done by the Dominion Government, as in substance it was in fact done. The Crown acts on the advice of ministers in making treaties, and in owning public lands holds them for the good of the community. When differences arise between the two Governments in regard to what is due to the Crown as maker of treaties from the Crown as owner of public lands they must be adjusted as though the two Governments were separately invested by the Crown with its rights and responsibilities as treaty maker and as owner respectively.

So regarding it, there does not appear sufficient ground for saying that the Dominion Government in advising the treaty did so as agent for the province. They acted with a view to great national interests, in pursuance of powers derived from the Act of 1867, without the consent of the province and in the belief that the lands were not within that province. They neither had nor thought they required nor purported to act upon any authority from the Provincial Government.

J. C. Again, it seems to their Lordships that the relation of trustee  
 1910 and cestui que trust, from which a right to indemnity might be  
 DOMINION OF derived, cannot, even in its widest sense, be here established.  
 CANADA The Dominion Government were indeed, on behalf of the Crown,  
 v. guardians of the Indian interest and empowered to take a sur-  
 PROVINCE OF render of it and to give equivalents in return, but in so doing  
 ONTARIO. they were not under any special duty to the province. And in  
 — regard to the proprietary rights in the land (apart from the  
 Indian interest) which through the Crown enured to the benefit  
 of the province, the Dominion Government had no share in it  
 at all. The only thing in regard to which the Dominion could  
 conceivably be thought trustees for the province, namely, the  
 dealing with the Indian interest, was a thing concerning the whole  
 Canadian nation. In truth, the duty of the Dominion Govern-  
 ment was not that of trustees, but that of ministers exercising  
 their powers and their discretion for the public welfare.

Another contention was advanced on behalf of the appellants  
 —that this is analogous to the case of a bona fide possessor or  
 purchaser of real estate who pays money to discharge an  
 existing incumbrance upon it without notice of an infirmity of  
 his title. It is enough to say that the Dominion Government  
 were never in possession or purchasers of these lands, that they  
 had, in fact, notice of the claim thereto of the true owner,  
 though they did not credit it, and that they did not pay off the  
 Indian incumbrance for the benefit of these lands, but for  
 distinct and important interests of their own.

This really is a case in which expenditure independently  
 incurred by one party for good and sufficient reasons of his own  
 has resulted in direct advantage to another. It may be that, as  
 a matter of fair play between the two Governments, as to which  
 their Lordships are not called upon to express and do not express  
 any opinion, the province ought to be liable for some part of  
 this outlay. But in point of law, which alone is here in question,  
 the judgment of the Supreme Court appears unexceptionable.

If the opinions of Burbidge J. and of the two dissenting  
 judges in the Supreme Court are examined, it will be found  
 that they rely almost entirely upon a passage in the judg-  
 ment delivered by Lord Watson at this Board in the case of

*St. Catherine's Milling and Lumber Co. v. The Queen.* (1)

J. C.

It must be acknowledged that this passage does give strong support to the view of those who rely upon it, and their Lordships feel themselves bound to regard this expression of opinion with the same respect that has been accorded to it by all the learned judges in Canada. They consider, however, that Idington J. and Duff J. have stated conclusive reasons against adopting the dictum alluded to as decisive of the present case. The point here raised was not either raised or argued in that case, and it is quite possible that Lord Watson did not intend to pronounce upon a legal right. If he did so intend, the passage in question must be regarded as obiter dictum.

1910  
DOMINION OF  
CANADA  
v.  
PROVINCE OF  
ONTARIO.

In the course of argument a question was mooted as to the liability of the Ontario Government to carry out the provisions of the treaty so far as concerns future reservations of land for the benefit of the Indians. No such matter comes up for decision in the present case. It is not intended to forestall points of that kind which may depend upon different considerations, and, if ever they arise, will have to be discussed and decided afresh.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. There will be no order as to costs.

Solicitors for appellant: *Charles Russell & Co.*

Solicitors for respondent: *Freshfields.*

(1) 14 App. Cas. 60.





The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1910, will be as follows:—

In the First Series,  
[1910] 1 Ch.                      [1910] 2 Ch.

In the Second Series,  
[1910] 1 K. B.                      [1910] 2 K. B.                      [1910] P.

In the Third Series,  
[1910] A. C.

## INDEX.

**ACCIDENT**—Workmen's compensation.  
*See* under EMPLOYER AND WORKMAN.

**ADMIRALTY.**  
*See* under SHIPPING.

**AFFIDAVIT**—Discovery of documents—Further affidavit of documents—Relevancy of documents - - - - - 452  
*See* PRACTICE. 2.

**AGENT**—Principal and.  
*See* under PRINCIPAL AND AGENT.

**AGRICULTURAL HOLDINGS (SCOTLAND) ACT, 1908** - - - - - 455  
*See* SCOTTISH LAW. 1.

**ANNUITY**—Income tax—Sale of annuities—Assessment on revenue from invested funds - - - - - 143  
*See* REVENUE. 2.

**APPEAL**—Street—General line of buildings—Superintending architect's certificate—Appeal to tribunal of appeal - 1  
*See* LONDON.

**ARBITRATION**—Award as to accounts of Common School Lands Fund—Jurisdiction of arbitrators—Submission as to accounts and destination of moneys received - - - - - 627  
*See* PRIVY COUNCIL APPEALS. 4.

— Friendly society—Dispute—Arbitration under rules—Order to pay costs—Jurisdiction - - - - - 404  
*See* FRIENDLY SOCIETY.

— Lease—Outgoing tenant—Sheep stock valuation—Agricultural Holdings (Scotland) Act, 1908 - - - - - 455  
*See* SCOTTISH LAW. 1.

**ARBITRATORS.**  
*See* under ARBITRATION.

**ARCHITECT**—Street—General line of buildings—Superintending architect's certificate—Appeal to tribunal of appeal - 1  
*See* LONDON.

**ATTACHMENT**—*Debts, Attachment of—Scottish Judgment—Extension to England—Garnishee Order Nisi—Service on Garnishee—Subsequent Bankruptcy of Judgment Debtor in Scotland—Rights of Trustee in Bankruptcy—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 117.*

A judgment for a sum of money which was obtained in an action in Scotland was extended to England under the Judgments Extension Act, 1868, and the judgment creditor served a garnishee order nisi on a firm who owed a debt in England to the judgment debtor.

After the service of the garnishee order nisi the whole estate of the judgment debtor was sequestrated under the Scottish bankruptcy law and transferred wherever situated to the appellant as trustee for the creditors with power to recover all estates, debts, or money due to the judgment debtor. In an interpleader issue in England between the trustee and the judgment creditor as to their respective claims to the garnished debt:—

*Held*, that the judgment creditor had by the service of the garnishee order nisi obtained an attachment in England before the date of the sequestration, and that the Scottish Court had no power to interfere with his claim.

Decision of the Court of Appeal, [1910] 1 K. B. 339, affirmed. GALBRAITH *v.* GRIMSHAW  
**H. L. (E.) 508**

**AUSTRALIA**—Laws of.  
*See* under PRIVY COUNCIL APPEALS.

**AWARD.**  
*See* under ARBITRATION.

**BANK**—Liability of bankers—Compradore's limited authority as their agent—Appeal from Hong Kong - - - 174  
*See* PRIVY COUNCIL APPEALS. 13.

**BANKRUPTCY**—Attachment of debts—Scottish judgment—Extension to England—Garnishee order nisi—Rights of trustee in bankruptcy - - - - 508  
See ATTACHMENT.

**BILL OF LADING**—Shipping.  
See under SHIPPING.

**BILL OF SALE**—Money-lender—Loan effected at borrower's residence—Illegality 422  
See MONEY-LENDERS. 1.

**BONDS**—Estate duty—Foreign bonds payable to bearer—Bonds physically situate in the United Kingdom - - - 27  
See REVENUE. 1.

**BONUS**—Income bond—Construction—Bonus payable out of profits—No profits earned—Issue of paid-up shares in exchange for bonus - - - 439  
See COMPANY.

**BRITISH COLUMBIA**—Laws of.  
See under PRIVY COUNCIL APPEALS.

**BUILDINGS**—Street—General line of buildings—Superintending architect's certificate—Appeal to tribunal of appeal 1  
See LONDON.

**BURGH SURVEYOR**—Master and servant—Extra work—Delay - - - 285  
See SCOTTISH LAW. 4.

**BURIAL**—*Disused Burial Ground*—Letting of Unused and Unconsecrated Land—Application of Rents—Parish—Vestry—Church Property—Borough Council—Transfer of Powers and Duties—Exception of Ecclesiastical Powers and Duties—Burial Act, 1857 (20 & 21 Vict. c. 81), s. 24—London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 4, 23.

Land bought with ecclesiastical funds was by a private Act (3 Geo. 3, c. 1) vested in the rector and churchwardens of St. George, Hanover Square, for ever for a burial ground for the inhabitants of the parish. The rector and his successors were to have the burial fees. Under the direction of the vestry, the rector and churchwardens granted building leases of the unconsecrated part of the land. In 1854 the burial ground was closed by an Order in Council. As the building leases fell in and the buildings were pulled down the rector and churchwardens, under the direction of the vestry, granted fresh leases:—

*Held*, that the land was originally Church property and did not cease to be Church property by virtue of the Burial Act, 1857, and that on the passing of the London Government Act, 1899—which by s. 4 transferred the powers and duties of vestries to borough councils, but by s. 23 excepted any powers or duties relating to the affairs of the Church or any interest of a vestry in any Church property—the power and duty to direct the application of the proceeds of the leases did not pass to the Westminster Corporation as the borough council, but remained in the vestry under s. 24 of the Burial Act, 1857.

**BURIAL**—*continued*.

The question to what purposes the proceeds of the leases ought to be applied could not be determined in this litigation.

Decision of the Court of Appeal, [1909] 1 Ch. 592, reversed. ST. GEORGE, HANOVER SQUARE (RECTOR AND CHURCHWARDENS) v. WESTMINSTER CORPORATION - H. L. (E.) 225

**BURIAL GROUND**—Separated from church—Churchyard—Liability to poor rate 7  
See RATES.

**CALLS**—Forfeiture of shares—Alleged irregularities in call and forfeiture—British Columbia Companies Acts, 1890, 1892  
See PRIVY COUNCIL APPEALS. 2. 317

**CANADA**—Laws of.  
See under PRIVY COUNCIL APPEALS.

**CANALS**—Canadian Canal Regulations—Priority of passage into Lachine Canal—Duty of vessel lying by - - 170  
See PRIVY COUNCIL APPEALS. 5.

**CASES** :—

— *Airdrie Magistrates v. Lanark County Council. Coatbridge Magistrates v. Lanark County Council*, (1906) 8 F. 802.  
Reported at a later stage.

[1910] A. C. 286

— *Anderson v. Bank of British Columbia*, (1876) 2 Ch. D. 644.  
Approved by H. L. (E.). JONES v. GREAT CENTRAL RAILWAY COMPANY - - - [1910] A. C. 4

— *Attorney-General v. Till*, [1909] 1 K. B. 694.

Reversed by H. L. (E.)

[1910] A. C. 50

— *Attorney-General for Ontario v. Attorney-General for Quebec*, [1903] A. C. 39.  
Followed by P. C. ATTORNEY-GENERAL FOR QUEBEC v. ATTORNEY-GENERAL FOR ONTARIO

[1910] A. C. 627

— *Barnes v. Brown* - [1909] 1 K. B. 38  
Overruled by H. L. (E.). BELLERBY v. HEYWORTH - [1910] A. C. 377

— *Bellerby v. Heyworth* - [1909] 2 Ch. 23  
Affirmed by H. L. (E.) - [1910] A. C. 377

— *Bury v. Famatina Development Corporation, Ltd.*, [1909] 1 Ch. 754.  
Affirmed by H. L. (E.) *sub nom.* FAMATINA DEVELOPMENT CORPORATION, LIMITED v. BURY

[1910] A. C. 439

— *Butterley Co. v. New Hucknall Colliery Co.*, [1909] 1 Ch. 37.  
Affirmed by H. L. (E.).

[1910] A. C. 381

— *Carmichael v. Greenock Harbour Trustees*, (1908) S. C. 944.

Affirmed by H. L. (Sc.).

[1910] A. C. 274

## CASES—continued.

- *Catt v. Wood* - [1908] 2 K. B. 458  
Affirmed by H. L. (E.) - [1910] **A. C. 404**
- *Chislett v. Macbeth & Co.*, [1909] 2 K. B. 811.  
Affirmed by H. L. (E.) *sub nom.* **MACBETH & CO. v. CHISLETT** [1910] **A. C. 220**
- *Cockburn of Langton's Case*, (1747) Mor. Dict. 150; (1755) H. L. 1 Pat. App. 603.  
Commented on by H. L. (Sc.). **WEDDERBURN v. LAUDERDALE (EARL OF)** - - - [1910] **A. C. 342**
- *Coldrick v. Partridge, Jones & Co.*, [1909] 1 K. B. 530.  
Affirmed by H. L. (E.) - [1910] **A. C. 77**
- *David v. Britannic Merthyr Coal Co.*, [1909] 2 K. B. 146.  
Affirmed by H. L. (E.) *sub nom.* **BRITANNIC MERTHYR COAL COMPANY v. DAVID** - [1910] **A. C. 74**
- *Dean v. Brown* - [1909] 2 K. B. 573  
Affirmed by H. L. (E.) *sub nom.* **BROWN v. DEAN** - [1910] **A. C. 373**
- *Denysen v. Mostert*, (1872) L. R. 4 P. C. 236.  
Followed by P. C. **NATAL BANK, LIMITED v. ROOD** - [1910] **A. C. 570**
- *Dinham v. Bradford*, (1869) L. R. 5 Ch. 519.  
Approved by P. C. **HORDERN v. HORDERN** - - - [1910] **A. C. 465**
- “*Draupner*,” *The* - - - [1909] P. 219  
Reversed by H. L. (E.) *sub nom.* **OWNERS OF S.S. “DRAUPNER” v. OWNERS OF CARGO OF S.S. “DRAUPNER.” THE “DRAUPNER”** [1910] **A. C. 450**
- *Edinburgh Life Assurance Co. v. Lord Advocate*, (1909) S. C. 847.  
Reversed by H. L. (Sc.). [1910] **A. C. 143**
- “*Egyptian*,” *The* - - - [1910] P. 38  
Affirmed by H. L. (E.) *sub nom.* **GRANT v. OWNERS OF S.S. “EGYPTIAN.” THE “EGYPTIAN”** - [1910] **A. C. 400**
- *Evans v. Vickers, Sons & Maxim, Ltd.*, [1910] 1 K. B. 554.  
Affirmed by H. L. (E.) *sub nom.* **VICKERS, SONS & MAXIM, LIMITED v. EVANS** - - [1910] **A. C. 444**
- *Gadd v. Provincial Union Bank*, [1909] 2 K. B. 353.  
Reversed by H. L. (E.) *sub nom.* **KIRKWOOD v. GADD** - [1910] **A. C. 422**
- *Galbraith v. Grimshaw and Baxter*, [1910] 1 K. B. 339.  
Affirmed by H. L. (E.) *sub nom.* **GALBRAITH v. GRIMSHAW** [1910] **A. C. 308**
- *Glasgow Navigation Co. v. Iron Ore Co.*, (1909) S. C. 1414.  
Affirmed by H. L. (Sc.). [1910] **A. C. 293**

## CASES—continued.

- *Gordon-Cumming v. Houldsworth*, (1909) S. C. 1198.  
Reversed by H. L. (Sc.). [1910] **A. C. 537**
- *Great Western Ry. Co. v. Carpalla United China Clay Co.*, [1909] 1 Ch. 218.  
Affirmed by H. L. (E.) [1910] **A. C. 83**
- *Hughes v. Clover, Clayton & Co.*, [1909] 2 K. B. 798.  
Affirmed by H. L. (E.) *sub nom.* **CLOVER, CLAYTON & CO. v. HUGHES** [1910] **A. C. 242**
- *Jones v. E. Hulton & Co.*, [1909] 2 K. B. 444.  
Affirmed by H. L. (E.) *sub nom.* **E. HULTON & CO. v. JONES** [1910] **A. C. 20**
- *Kent Coal Concessions, Ltd. v. Duguid*, [1910] 1 K. B. 904.  
Affirmed by H. L. (E.). [1910] **A. C. 452**
- *Llangatlock (Lord) v. Watney, Combe, Reid & Co.*, [1910] 1 K. B. 236.  
Affirmed by H. L. (E.). [1910] **A. C. 394**
- *Mackison v. Dundee Magistrates*, (1909) S. C. 971.  
Affirmed by H. L. (Sc.). [1910] **A. C. 285**
- *McLean v. Moss Bay Co.*, [1909] 2 K. B. 521.  
Overruled by H. L. (E.). **HODGSON v. WEST STANLEY COLLIERY** [1910] **A. C. 229**
- *Marshall v. Owners of S.S. Wild Rose*, [1909] 2 K. B. 46.  
Affirmed by H. L. (E.). [1910] **A. C. 486**
- *Moore v. Manchester Liners, Ltd.*, [1909] 1 K. B. 417.  
Reversed by H. L. (E.). [1910] **A. C. 498**
- *North British Ry. Co. v. Budhill Coal and Sandstone Co.*, (1909) S. C. 217.  
Reversed by H. L. (Sc.). [1910] **A. C. 116**
- *North Manchester Overseers v. Winstanley*, [1908] 1 K. B. 835.  
Affirmed by H. L. (E.) *sub nom.* **WINSTANLEY v. NORTH MANCHESTER OVERSEERS** - - [1910] **A. C. 7**
- *Oosthuizen v. Moeke*, (1866) 1 Roscoe, 230.  
Approved by P. C. **NATAL BANK, LIMITED v. ROOD** - [1910] **A. C. 570**
- *Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163.  
Affirmed by H. L. (E.) *sub nom.* **AMALGAMATED SOCIETY OF RAILWAY SERVANTS v. OSBORNE** [1910] **A. C. 87**
- *Powell v. Main Colliery Co.*, [1900] A. C. 366.  
Dicta in, considered by H. L. (E.). **THOMPSON v. GOOLD & Co.** [1910] **A. C. 400**



**CASES—continued.**

— *Rey v. Leconturier* - [1908] 2 Ch. 715  
Affirmed by H. L. (E.).

[1910] A. C. 262

— *Sadler v. Whiteman*. [1910] 1 K. B. 868  
Partly affirmed and partly reversed by  
H. L. (E.) *sub nom.* *WHITEMAN v.*  
*SADLER* - - - [1910] A. C. 514

— *St. Catherine's Milling and Lumber Co. v.*  
*The Queen*, (1888) 14 App. Cas. 46.  
Considered by P. C. DOMINION OF  
CANADA *v.* PROVINCE OF ONTARIO  
[1910] A. C. 637

— *Screw Collier Co. v. Webster or Kerr*,  
(1909) S. C. 561.  
Affirmed by H. L. (Sc.).

[1910] A. C. 165

— *Senior v. Fountains* - [1907] 2 K. B. 563  
Overruled by H. L. (E.). *HODGSON v.*  
*WEST STANLEY COLLIERY*

[1910] A. C. 229

— *Stewart v. Williamson* (1909) S. C. 1254  
Affirmed by H. L. (Sc.).

[1910] A. C. 455

— *Toronto Corporation v. Toronto Ry. Co.*,  
[1907] A. C. 315.  
Judgment in, held by P. C. to be per-  
fectly clear, and that the Order in  
Council thereon was unaffected by  
Ontario Act (8 Edw. 7, c. 112), s. 1.  
*TORONTO CORPORATION v. TORONTO*  
*RAILWAY COMPANY* [1910] A. C. 312

— *Vyse v. Foster* - (1874) L. R. 7 H. L. 318  
Approved by P. C. *HORDERN v.*  
*HORDERN* - - - [1910] A. C. 465

— *Wedderburn v. Lauderdale (Earl of)*, (1905)  
7 F. 1045; (1908) S. C. 1237.  
Reversed by H. L. (Sc.).

[1910] A. C. 342

— *Westminster Corporation v. St. George,*  
*Hanover Square (Rector and Church-*  
*wardens)*, [1909] 1 Ch. 592.  
Reversed by H. L. (E.) *sub nom.* *ST.*  
*GEORGE, HANOVER SQUARE (RECTOR*  
*AND CHURCHWARDS)* *v. WEST-*  
*MINSTER CORPORATION*

[1910] A. C. 225

— *Winans v. Attorney-General*, [1904] A. C.  
287.

See *WINANS v. ATTORNEY-GENERAL*  
(No. 2), H. L. (E.) [1910] A. C. 27

— *Winans v. Rex* - [1908] 1 K. B. 1022  
Affirmed by H. L. (E.) *sub nom.*  
*WINANS v. ATTORNEY - GENERAL*  
(No. 2) - - - [1910] A. C. 27

**CHARTERPARTY—Shipping.**

See under SHIPPING.

“**CHARTREUSE**”—Trade mark—Passing off—  
French Law of Associations - 262  
See TRADE MARK.

**CHINA AND COREA—Laws of** - - 204  
See PRIVY COUNCIL APPEALS. 12.

**CHINA CLAY.**

See under CLAY.

**CHURCHYARD**—Burial ground separated from  
church—Liability to poor rate - 7  
See RATES.

**CIVIL SERVICE**—Superannuation allowance—  
Construction—“Officer” - - 476  
See PRIVY COUNCIL APPEALS. 16.

**CLAY**—China clay—Mines and “other minerals”  
—Railway company—Compulsory pur-  
chase of surface - - - 83  
See RAILWAY. 1.

**COAL MINES.**

See under MINES.

**COLLISION**—Firth of Forth a “narrow channel”  
—Damages for loss of life—Ship in  
fault - - - 165  
See SHIPPING. 2.

— Negligence of defendants’ servant causing  
original damage—Liability for con-  
sequential damage - - - 400  
See SHIPPING. 3.

— Signal as to alteration of course—No duty  
to stop if signal unanswered - 204  
See PRIVY COUNCIL APPEALS. 12.

**COLLISIONS AT SEA (REGULATIONS FOR  
PREVENTING)**, art. 25 - - 165  
See SHIPPING. 2.

— art. 29 - - - 204  
See PRIVY COUNCIL APPEALS. 12.

**COLUMBIA (BRITISH)—Laws of.**

See under PRIVY COUNCIL APPEALS.

**COMMISSION**—Principal and agent—Com-  
mission on sale of mining property—  
Sale completed on terms disapproved  
by agent - - - 614  
See PRIVY COUNCIL APPEALS. 8.

**COMPANY**—*Income Bond*—*Construction*—  
*Bonus payable out of Profits*—*No Profits earned*  
—*Issue of paid-up Shares in Exchange for Bonus*  
—*Dividends out of Capital*—*Want of Considera-*  
*tion—Ultra vires.*

A limited company being in want of money  
borrowed it by the issue of 10*l.* bonds on the  
terms that the company would when and so far  
as there were net profits available for the pur-  
pose pay to the bondholder the principal money  
of 10*l.* together with a bonus of 25*l.*, the principal  
money and bonus to be paid exclusively out of  
profits.

Years later, the company having made no  
profits whatever and being still in want of  
money, it was arranged with the consent of all  
parties interested that new 1*l.* shares should be  
issued and the bonus of 25*l.* satisfied or ex-  
tinguished by the allotment of twenty of the  
new 1*l.* shares considered as fully paid:—

*Held*, that it was ultra vires for the company  
to make the charge on future net profits a charge  
on capital and a present debt and to issue  
shares fully paid up in satisfaction of the debt

**COMPANY**—*continued.*

so created, the charge being exclusively on income.

*Quere* whether it is possible for directors to create a debt against their company and to saddle their company with it for the purpose of enabling them to issue shares without payment in cash, however advantageous they may consider the transaction to be.

Decision of the Court of Appeal, *Bury v. Fatatina Development Corporation, Ltd.*, [1909] 1 Ch. 754, affirmed. **FAMATINA DEVELOPMENT CORPORATION, LIMITED v. BURY**

**H. L. (E.) 439**

— Shares, Forfeiture of—Alleged irregularities in call and forfeiture—British Columbia Companies Acts, 1890, 1892 - **317**  
*See* PRIVY COUNCIL APPEALS. 2.

**COMPENSATION**—Licensing Acts.

*See* under LICENSING ACTS.

— Shipping—"Seaman"—Employers' liability **220**  
*See* EMPLOYER AND WORKMAN. 5.

— Workmen's compensation.  
*See* under EMPLOYER AND WORKMAN.

**COMPRADORE**—Liability of bankers—Compradore's limited authority as their agent—Appeal from Hong Kong - **174**  
*See* PRIVY COUNCIL APPEALS. 13.

**CONDITION PRECEDENT**—New Zealand Property Law Act, 1908—Suit by lessee on a covenant to renew the lease—No relief against performance of condition precedent - - - **335**  
*See* PRIVY COUNCIL APPEALS. 22.

**CONSIDERATION**—Company—Dividends out of capital—Want of consideration. *Ultra vires* - - - **439**  
*See* COMPANY.

**CONTRACT**—Entry—Exclusive right of entry on appellants' land for specified purposes—Laws of Newfoundland - **560**  
*See* PRIVY COUNCIL APPEALS. 23.

— Vendor and purchaser.  
*See* under VENDOR AND PURCHASER.

**CONTRACT OF SERVICE**—Implied term of—Negligence of fellow servants - **77**  
*See* EMPLOYER AND WORKMAN. 9.

**COREA (CHINA AND)**—Laws of - - **204**  
*See* PRIVY COUNCIL APPEALS. 12.

**CORPORATION**—Gasworks, Value of, as a going concern—New Zealand, Law of - **300**  
*See* PRIVY COUNCIL APPEALS. 21.

**COSTS**—Friendly society—Dispute—Arbitration under rules—Order to pay costs—Jurisdiction—*Ultra vires* - - - **404**  
*See* FRIENDLY SOCIETY.

— Where Crown litigant - - - **143**  
*See* REVENUE. 2.

**COUNTY COURT**—*Practice*—*New Trial*—*Jurisdiction of Judge to grant a New Trial*—*County Courts Act*, 1888 (51 & 52 Vict. c. 43), s. 93.

The power given by s. 93 of the County Courts Act, 1888, to a county court judge, "if he shall think just, to order a new trial to be had upon such terms as he shall think reasonable," is a judicial, not an arbitrary, discretion, and the judge is bound by the rules binding upon the High Court.

Decision of the Court of Appeal, *Dean v. Brown*, [1909] 2 K. B. 573, affirmed. **BROWN v. DEAN** - - - **H. L. (E.) 373**

**COVENANT**—New Zealand Property Law Act, 1908—Relief against forfeiture on breach of covenant - - - **335**  
*See* PRIVY COUNCIL APPEALS. 22.

**CROWN**—Costs where Crown litigant - **143**  
*See* REVENUE. 2.

**CROWN LANDS**—New South Wales Crown Lands Alienation Act, 1861—Contract of sale of conditional purchases—Subject to the provisions of local laws and regulations - - - **330**  
*See* PRIVY COUNCIL APPEALS. 17.

— New South Wales Crown Lands Acts - **186**  
*See* PRIVY COUNCIL APPEALS. 18.

**CUSTOMS AND INLAND REVENUE.**  
*See* under REVENUE.

**DAMAGE AND DAMAGES**—Shipping—Collision—Damages for loss of life—Ship in fault—Firth of Forth a "narrow channel" - - - **165**  
*See* SHIPPING. 2.

— Shipping—Collision—Negligence of defendants' servant causing original damage—Liability for consequential damage  
*See* SHIPPING. 3. **400**

— Shipping—Damage to cargo—Bill of lading—Charterparty—Negligence clause **450**  
*See* SHIPPING. 4.

**DEBTS**—Attachment of—Scottish judgment—Extension to England—Garnishee order nisi—Rights of trustee in bankruptcy  
*See* ATTACHMENT. **508**

**DEFAMATION**—*Libel in Newspaper*—*Publication*—*Intention to defame Plaintiff*.

In an action for libel it is no defence to shew that the defendant did not intend to defame the plaintiff, if reasonable people would think the language to be defamatory of the plaintiff.

The appellants, owners and publishers of a newspaper, published in an article defamatory statements of a named person believed by the author of the article and the editor of the paper to be a fictitious personage with an unusual name. The name was that of the respondent, who was unknown to the author, and the editor. In an action for libel against the appellants it was admitted that neither the writer nor the editor nor the appellants intended to defame the respondent, but evidence was given by his

**DEFAMATION**—*continued*.

friends that they thought the article referred to him :—

*Held*, that the plaintiff was entitled to maintain the action.

Decision of the Court of Appeal, [1909] 2 K. B. 444, affirmed. *E. HULTON & Co. v. JONES* - - - - **H. L. (E.) 20**

**DELAY**—Master and servant—Burgh surveyor—Extra work - - - - **285**  
See *SCOTTISH LAW*. 4.

**DEMURRAGE**—Shipping.  
See under *SHIPPING*.

**DENTIST**—*Unregistered Person—Description*—“Specially qualified to practise dentistry”—*Dentists Act*, 1878 (41 & 42 Vict. c. 33), s. 3.

The words “specially qualified to practise dentistry” in s. 3 of the *Dentists Act*, 1878, refer to a qualification by diploma, certificate, or other hall mark and not to competence or skill.

Decision of the Court of Appeal, [1909] 2 Ch. 23, affirmed.

*Barnes v. Brown*, [1909] 1 K. B. 38, overruled. *BELLERBY v. HEYWORTH* **H. L. (E.) 377**

**DEPENDANTS** — Workmen's compensation — Father and two sons killed—Dependency, total and partial — Common fund - - - - **229**  
See *EMPLOYER AND WORKMAN*. 1.

**DIGNITY** — Jurisdiction — Non-alienability of office of Standard Bearer of Scotland—Sale of office—Prescription - - **342**  
See *SCOTTISH LAW*. 2.

**DISCOVERY**—Documents—Further affidavit of documents—Relevancy of documents—Discretion - - - - **452**  
See *PRACTICE*. 2.

— Production of documents between member of trade union and union authorities — Privilege between solicitor and client - - - - **4**  
See *PRACTICE*. 1.

**DISCRETION**—Discovery of documents—Further affidavit of documents—Relevancy of documents - - - - **452**  
See *PRACTICE*. 2.

**DISEASE** — Workmen's compensation — Accident - - - - **242**  
See *EMPLOYER AND WORKMAN*. 2.

**DIVIDENDS** — Company — Dividends out of capital—Want of consideration—Ultra vires - - - - **439**  
See *COMPANY*.

**DOCUMENTS**—Discovery—Production of documents between member of trade union and union authorities — Privilege between solicitor and client - - **4**  
See *PRACTICE*. 1.

**DROWNING**—Workmen's compensation—Seaman — Unexplained drowning — Evidence - - - - **486**  
See *EMPLOYER AND WORKMAN*. 4.

**DUTY**—Inland Revenue.  
See under *REVENUE*.

**ECCLESIASTICAL LAW**—Burial.  
See under *BURIAL*.

**EMPLOYER AND WORKMAN**—*Compensation* — *Dependency, total and partial* — *Common Fund*—*Father and Two Sons killed*—*Workmen's Compensation Act*, 1906 (6 Edw. 7, c. 58), s. 13 ; *First Schedule* (1.) (a).

A father and his two sons, workmen in the same employment, were killed by one and the same accident. The earnings of all three formed a common fund out of which the whole family was maintained. The mother and her surviving children (none of whom earned wages) were as a matter of fact dependent upon the earnings of each and all of the three deceased :—

*Held*, that the mother and her surviving children were entitled to compensation in respect of each of the three deaths under the *Workmen's Compensation Act*, 1906.

Decision of the Court of Appeal (not reported) reversed.

*Senior v. Fountains*, [1907] 2 K. B. 563, and *McLean v. Moss Bay Co.*, [1909] 2 K. B. 521, overruled. On April 15, with the consent of the respondents, the House reversed the decision of the Court of Appeal in *McLean v. Moss Bay Co.* on the question of the wife's dependency and made an award in her favour for 30*l.* and costs. *HODGSON v. WEST STANLEY COLLIERY*

**H. L. (E.) 229**

2. — *Compensation—Disease—Accident* — *Workmen's Compensation Act*, 1906 (6 Edw. 7, c. 58), s. 1.

A workman suffering from serious aneurism was employed in tightening a nut by a spanner when he suddenly fell down dead from rupture of the aneurism. The county court judge found upon conflicting evidence that death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal :—

*Held* by Lord Loreburn L.C. and Lords Macnaghten and Collins (Lords Atkinson and Shaw of Dunfermline dissenting), that there was evidence to support the finding, and that it was a case of “personal injury by accident arising out of and in the course of the employment” within the *Workmen's Compensation Act*, 1906.

Decision of the Court of Appeal, [1909] 2 K. B. 798, affirmed. *CLOVER, CLAYTON & Co., LIMITED v. HUGHES* - - **H. L. (E.) 242**

3. — *Compensation—Infant—Compensation to a Minor* — *Review of Weekly Payments*—*Probable Earnings* — *Former Employment* — *Workmen's Compensation Act*, 1906 (6 Edw. 7, c. 58), *Sched. I.* (16.).

Upon a review of the weekly payments to a workman under the *Workmen's Compensation Act*, 1906, who has been injured by an accident entitling him to compensation and who was then under age, if the review takes place more than twelve months after the accident “the amount of the weekly payments may be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman would probably have



**EMPLOYER AND WORKMAN—continued.**

been earning at the date of the review if he had remained uninjured, but not in any case exceeding 11," as enacted by the proviso to clause 16 of Sched. I.

The probable earnings there referred to are not restricted to what the workman would probably have been earning in his actual employment under the same employer, but are left to the discretion and good sense of the county court judge upon the evidence.

Decision of the Court of Appeal, *Evans v. Vickers, Sons & Maxim, Ltd.*, [1910] 1 K. B. 554, affirmed. **VICKERS, SONS & MAXIM, LIMITED v. EVANS** - - - - **H. L. (E.) 444**

**4. — Compensation — Ship — Seaman — Accident arising out of and in the Course of the Employment—Unexplained Drowning—Evidence—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1.**

An engineer employed on board a steam trawler lying in a harbour basin went on deck (as he said) to cool himself on a very hot night. His dead body was found the next morning in the water just under the rail on the starboard quarter where he was in the habit of sitting in hot weather. There was no evidence how the death happened :—

*Held* by Lords Atkinson, Shaw of Dunfermline, and Mersey (Lord Loreburn L.C. and Lord James of Hereford dissenting), that as a matter of fact there was no evidence to shew that the engineer's death was caused by an accident arising out of his employment.

Decision of the Court of Appeal, [1909] 2 K. B. 46, affirmed. **MARSHALL v. OWNERS OF S.S. WILD ROSE** - - - **H. L. (E.) 486**

**5. — Compensation — Ship—"Seaman"—Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 13—Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 8.**

The definition of the word "seaman" in the Merchant Shipping Acts, 1854 and 1894, ought not to be imported into the Employers' Liability Act, 1880, which excludes seamen from its operation.

The respondent was injured while employed on board a steamship in helping to unmoor and warp her from one berth to another across a large dock in Liverpool. She was taken across by means of a tug and a rope and was at no moment entirely free from a quay, and did not use her steam or any motive power of her own. The respondent was not one of the ship's crew and had not been to sea for several years.

In an action by the respondent against his employers the shipowners to recover damages for the injury under the Employers' Liability Act, 1880 :—

*Held*, that the respondent was not a "seaman" and was not excluded from the operation of the Act.

Decision of the Court of Appeal, [1909] 2 K. B. 811, affirmed. **MACBETH & CO. v. CHISLETT** - - - **H. L. (E.) 220**

**6. — Compensation — Ship — Seaman — Employment—Accident arising out of and in the Course of the Employment—Ladder—Workmen's**

**EMPLOYER AND WORKMAN—continued.**

*Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 1.*

A seaman employed on a ship in port went ashore after work was over with leave of absence, bought necessities for himself, and spent some time in drinking. On returning to the ship at midnight, while climbing a ladder insecurely fixed between the quay and the ship (the only means of communication), he fell into the water and was drowned :—

*Held* by Lord Loreburn L.C. and Lords Ashbourne and James of Hereford (Lords Macnaghten and Mersey dissenting), that the accident arose out of and in the course of his employment and that the seaman's widow was entitled to compensation.

Lords Macnaghten and Mersey held that the accident did not arise out of or in the course of his employment, the seaman having gone ashore for his own purposes.

Decision of the Court of Appeal, [1909] 1 K. B. 417, reversed. **MOORE v. MANCHESTER LINERS, LIMITED** - - - **H. L. (E.) 498**

**7. — Compensation—Specific Sum — Compensation for Injuries by Accident—Claim for Compensation—No Demand for specific Sum—Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 2.**

In making a claim for compensation under the Workmen's Compensation Act, 1897, it is not necessary to specify any sum.

Former authorities and dicta to the contrary effect overruled : *per* Lord Atkinson and Lord Shaw of Dunfermline, they proceeded on a misunderstanding of dicta in *Powell v. Main Colliery Co.*, [1900] A. C. 366.

Decision of the Court of Appeal (not reported) reversed. **THOMPSON v. GOOLD & CO.**  
**H. L. (E.) 409**

**8. — Negligence—Burden of Proof—Statutory Duty—Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 12, s. 50—Coal Mines Regulation Act, 1896 (59 & 60 Vict. c. 43), s. 6.**

An explosion in a mine was caused by a blasting operation conducted in breach of the rules of the Coal Mines Regulation Acts. In an action against the mine-owners to recover damages for injury to a miner by the explosion the judge held that the burden of proving that the owners had neglected their duty to enforce the statutory rules lay on the plaintiff, and, as the plaintiff had failed to produce evidence on that point, the defendants obtained a verdict and judgment :—

*Held*, that upon the question whether the mine authorities had done their duty in taking proper care of the safety of the miners the burden of proof did not lie upon the plaintiff.

Order of the Court of Appeal for a new trial, [1909] 2 K. B. 146, affirmed, but some of the reasons disapproved. **BRITANNIC MERTHYR COAL COMPANY, LIMITED v. DAVID**  
**H. L. (E.) 74**

**9. — Negligence—Common Employment—Risk incidental to Employment—Negligence of**



**EMPLOYER AND WORKMAN—continued.**

*Fellow Servants—Implied Term of Contract of Service.*

Colliery proprietors, who possessed a railway in connection with the colliery, ran a train thereon for the carriage of their colliers, free of charge, from the colliery towards their homes after the day's work. One of the colliers while being so carried met his death through an accident occasioned by the negligence of servants of his employers engaged in the repair of a bridge over the railway:—

*Held*, that the deceased must as between himself and his employers be deemed to have undertaken the risk of such an accident, and that an action could not be maintained against his employers under the Fatal Accidents Act, 1846, in respect of his death.

Decisions of Bray J. and the Court of Appeal, [1909] 1 K. B. 530, affirmed. *COLDRICK v. PARTRIDGE, JONES & Co., LIMITED*

**H. L. (E.) 77**

— British Columbia Families Compensation Act—Action for damages for death of appellants' son—Negligence by respondents—Misdirection as to contributory negligence by deceased—Practice **606**  
*See PRIVY COUNCIL APPEALS. 3.*

— Burgh surveyor—Extra work—Delay **285**  
*See SCOTTISH LAW. 4.*

— Shipping—Collision—Negligence of defendants' servant causing original damage—Liability for consequential damage  
*See SHIPPING. 3.* **400**

**ENTRY**—Contract—Construction—Exclusive right of entry on appellant's land for specified purposes - - - **560**  
*See PRIVY COUNCIL APPEALS. 23.*

**ESTATE DUTY.**  
*See under REVENUE.*

**EVIDENCE**—Necessary implication—Mines—Overlying and underlying seams of coal—Powers of working—Subsidence—Right to support - - - **381**  
*See MINES.*

— Workmen's compensation—Seaman—Unexplained drowning - - - **486**  
*See EMPLOYER AND WORKMAN. 4.*

**EXECUTOR**—Partnership—Provision for purchase by survivor of share of deceased partner—Surviving partner sole executor of deceased—Valuation - - - **465**  
*See PRIVY COUNCIL APPEALS. 19.*

**FACTOR**—Greenock Harbour Acts—Judicial factor—Receiver—Power to increase rates - - - **274**  
*See SCOTTISH LAW. 3.*

**FALSE IMPRISONMENT**—Action for—Contract as to entry on and exit from wharf—Toll—Unreasonable conduct of plaintiff—Nonsuit - - - **295**  
*See PRIVY COUNCIL APPEALS. 1.*

**FARMING LEASE**—Arbitration—Outgoing tenant—Sheep stock valuation—Agricultural Holdings (Scotland) Act, 1908 - - - **455**  
*See SCOTTISH LAW. 1.*

**FINANCE ACTS.**

*See under REVENUE.*

**FIRE INSURANCE.**

*See under INSURANCE (FIRE).*

**FIRTH OF FORTH**—a “narrow channel”—Ship—Collision—Damages for loss of life—Ship in fault - - - **165**  
*See SHIPPING. 2.*

**FOOT PASSENGERS**—Right for - - - **169**  
*See HIGHWAY.*

**FOREIGN BONDS**—Estate duty—Foreign bonds payable to bearer—Bonds physically situate in the United Kingdom—Marketable securities - - - **27**  
*See REVENUE. 1.*

**FORFEITURE**—Lease—New Zealand Property Law Act, 1908—Relief against forfeiture on breach of covenant. - **335**  
*See PRIVY COUNCIL APPEALS. 22.*

— Shares—Alleged irregularities in call and forfeiture—British Columbia Companies Acts, 1890, 1892 - - - **317**  
*See PRIVY COUNCIL APPEALS. 2.*

**FRANCE**—Trade mark—Passing off—“Char-treuse”—French Law of Associations—Effect of French law upon property in English trade marks - - - **262**  
*See TRADE MARK.*

**FRIENDLY SOCIETY**—Dispute—Arbitration under Rules—Order to pay Costs—Jurisdiction—*Ultra vires*—Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68.

The appellant, a member of a friendly society, claimed from the society sick pay on behalf of his son, who was also a member, but was mentally afflicted and unable to claim it for himself. The court arbitration committee decided against the claim, and that decision was affirmed on appeal by the district arbitration committee, who charged the appellant with the expenses of the proceeding. The appellant having refused to pay the expenses was suspended and ceased to be a member. In an action by the appellant against the society claiming an injunction and damages for wrongful exclusion:—

*Held*, that the questions about sick pay and expenses were disputes within s. 68 of the Friendly Societies Act, 1896, and therefore should be decided only in the manner directed by the rules of the society; that the rules were not *ultra vires*; that the decisions—even if erroneous in point of law—being given without misconduct were binding and conclusive and not removable into any Court of law or restrainable by injunction and could be enforced without resorting to a county court; and that the action was not maintainable.

Decision of the Court of Appeal, [1908] 2 K. B. 458, affirmed. *CATT v. WOOD* - **H. L. (E.) 404**

**GARNISHEE**—Attachment of debts—Scottish judgment—Extension to England—Garnishee order nisi—Rights of trustee in bankruptcy - - - - 508  
See ATTACHMENT.

**GASWORKS**—Value of gasworks as a going concern—New Zealand, Law of - 300  
See PRIVY COUNCIL APPEALS. 21.

**GREENOCK HARBOUR ACTS**—Judicial factor—Receiver—Power to increase rates - 274  
See SCOTTISH LAW. 3.

**HARBOUR**—Greenock Harbour Acts—Judicial factor—Receiver—Power to increase rates - - - - 274  
See SCOTTISH LAW. 3.

**HIGHWAY**—*Right for Foot Passengers—Prescriptive Use—Accumulated Use attributable to Two Roads—Substituted Roads—Right of Way.*

By the law of Scotland, if it can be inferred from the evidence that a new road was taken as of right as a substitute for an old road, the years of use of both roads can be added together to make the prescriptive period. YOUNG v. KINLOCH - - - - H. L. (Sc.) 169

**HONG KONG**—Laws of - - - - 174  
See PRIVY COUNCIL APPEALS. 13.

**HYPOTHETICAL CASE**—Shipping—Demurrage—Charterparty—Bill of lading not put in evidence - - - - 293  
See SHIPPING. 1.

**IMPRISONMENT**—Action for false imprisonment—Contract as to entry on and exit from wharf—Toll - - 295  
See PRIVY COUNCIL APPEALS. 1.

**INCOME BOND**—Construction—Bonus payable out of profits—No profits earned—Issue of paid-up shares in exchange for bonus - - - - 439  
See COMPANY.

**INCOME TAX.**  
See under REVENUE.

**INDIANS**—Canada, Law of—Treaty of October 3, 1873, extinguishing the Indian interest in lands - - - - 637  
See PRIVY COUNCIL APPEALS. 10.

**INFANT**—Workmen's compensation—Review of weekly payments—Probable earnings—Former employment - - - 444  
See EMPLOYER AND WORKMAN. 3.

**INLAND REVENUE.**  
See under REVENUE.

**INSURANCE (FIRE)**—Policy—Protection from liability while gasoline is stored or kept in the building insured—Construction—“Stored or kept” - - - 592  
See PRIVY COUNCIL APPEALS. 6.

**INSURANCE (MARINE)**—Insurance against total loss of cargo “by total loss of vessel”—Construction—Total loss of thing insured - - - - 598  
See PRIVY COUNCIL APPEALS. 7.

**ISLE OF MAN**—Laws of.  
See under PRIVY COUNCIL APPEALS.

**JUDGMENT**—Attachment of debts—Scottish judgment—Extension to England—Garnishee order nisi—Rights of trustee in bankruptcy - - - - 508  
See ATTACHMENT.

**JUDICIAL FACTOR.**  
See under FACTOR.

**JURISDICTION**—Arbitrators.  
See under ARBITRATION.

—County court—Jurisdiction of judge to grant - - - - 373  
See COUNTY COURT.

—Friendly society—Dispute—Arbitration under rules—Order to pay costs—Ultra vires - - - - 404  
See FRIENDLY SOCIETY.

**LACHINE CANAL**—Priority of passage into—Duty of vessel lying by—Canadian Canal Regulations, 1895 - - 170  
See PRIVY COUNCIL APPEALS. 5.

**LADDER**—Workmen's compensation—Ship—Seaman - - - - 498  
See EMPLOYER AND WORKMAN. 6.

**LAND APPEAL COURT**—Jurisdiction of—New South Wales Crown Land Acts - 186  
See PRIVY COUNCIL APPEALS. 18.

**LEASE**—Farming lease—Arbitration—Outgoing tenant—Sheep stock valuation—Agricultural Holdings (Scotland) Act, 1908 - - - - 455  
See SCOTTISH LAW. 1.

—Licensing Acts—Compensation—Charge on renewed licences—Deduction from rent—Unexpired term—Reversionary lease - - - - 394  
See LICENSING ACTS.

—New Zealand Property Law Act, 1908—Suit by lessee on a covenant to renew the lease—Specific performance - 835  
See PRIVY COUNCIL APPEALS. 22.

**LIBEL.**  
See under DEFAMATION.

**LICENSING ACTS**—Compensation—Charge on Renewed Licences—Deduction from Rent—Unexpired Term—Reversionary Lease—Licensing Act, 1904 (4 Edw. 7, c. 23), s. 3, sub-s. 3; Sched. II.

The expression “unexpired term” in Sched. II. of the Licensing Act, 1904, must be construed strictly and legal effect given to legal language. It does not include an interest in a

**LICENSING ACTS—continued.**

reversionary lease which is a mere interesse termini.

The respondents were lessees of a public-house under a lease expiring at Christmas, 1909, and were also grantees of a lease of the same public-house for a term beginning from the day next but one after the expiration or other sooner determination of the expiring lease. The licence was renewed in October, 1908, and quarter sessions imposed a compensation charge under s. 3, sub-s. 1:—

*Held*, that the unexpired term did not include the lessees' interest in the reversionary lease. which was a mere interesse termini.

Decision of the Court of Appeal, [1910] 1 K. B. 236, affirmed. **LORD LLANGATTOCK v. WATNEY, COMBE, REID & CO. H. L. (E.) 394**

**LONDON—Street—Building—General Line of Buildings—Superintending Architect's Certificate—Appeal to Tribunal of Appeal—London Building Act, 1894 (57 & 58 Vict. c. cccviii.), ss. 22, 182.**

Where under the London Building Act, 1894, the superintending architect has by his certificate defined the general line of buildings in a street, the tribunal of appeal under the Act has no power to define a general line of buildings in that part of the street other than the general line defined by the certificate, if the certificate has not been appealed against and no buildings have been erected since the date of the certificate which altered or might alter the general line defined by it.

The object of the Act was to secure general lines of building to which all must conform. **LILLEY v. LONDON COUNTY COUNCIL**

**H. L. (E.) 1**

— Burial—Disused burial ground— Letting of unused and unconsecrated land— Application of rents - - - **225**  
*See* **BURIAL.**

**MANX LOCAL GOVERNMENT ACT, 1886 - 565**  
*See* **PRIVY COUNCIL APPEALS. 15.**

**MARINE INSURANCE.**

*See* under **INSURANCE (MARINE).**

**MASTER AND SERVANT.**

*See* under **EMPLOYER AND WORKMAN.**

**MERCHANT SHIPPING.**

*See* under **SHIPPING.**

**METROPOLIS.**

*See* under **LONDON.**

**MINERALS.**

*See* under **MINES.**

**MINES — Overlying and underlying Seams of Coal—Powers of Working—Subsidence—Right to Support—Evidence—Necessary Implication.**

The owner of land granted to the appellants a lease of a seam of coal overlying another seam, with full powers of working the overlying seam, but reserving to the owner the right of granting a lease of the underlying seam, with full powers

**MINES—continued.**

of working subject to a covenant by the owner to indemnify the lessees of the overlying seam against physical damage caused by working the underlying seam; the appellants to have the first offer of a lease of the underlying seam. That offer having been made and refused, a lease of the underlying seam was granted to the respondents. It appeared from the leases and from evidence of the practice of mining that the parties must have contemplated that the underlying seam would be worked concurrently with the overlying seam, and that the proper mode of working the underlying seam was by the long-wall system, which would of necessity produce subsidence in the overlying seam:—

*Held*, that the respondents were entitled to work the underlying seam by the long-wall system, leave to cause subsidence being clearly implied.

Decision of the Court of Appeal, [1909] 1 Ch. 37, affirmed. **BUTTERLEY COMPANY v. NEW HUCKNALL COLLIERY COMPANY - H. L. (E.) 381**

— Mines and "other minerals"—China clay  
*See* **RAILWAY. 1. 83**

— Mines of coal, ironstone, slate, or other minerals - - - - - **116**  
*See* **RAILWAY. 2.**

— Negligence—Burden of proof—Statutory duty—Coal Mines Regulation Acts - **74**  
*See* **EMPLOYER AND WORKMAN. 8.**

**MONEY-LENDERS — Business carried on at other than Registered Address—Loan effected at Borrower's Residence—Illegality—Bill of Sale —Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2, sub-s. 1 (b).**

The Money-lenders Act, 1900, in requiring that a money-lender "shall carry on the money-lending business in his registered name and in no other name and under no other description, and at his registered address or addresses and at no other address," does not mean that every stage and every incident of every piece of the money-lending business is to be transacted at the registered office.

The question is a question of fact, not of law, and must be answered according to the circumstances of the case.

Decision of the Court of Appeal, *Gadd v. Provincial Union Bank*, [1909] 2 K. B. 353, reversed and the interim injunction discharged. **KIRKWOOD v. GADD - H. L. (E.) 422**

**2. — Registration—"Usual trade name"—Carrying on more than one Business—Contracts in Registered Name—Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2.**

Under the Money-lenders Act, 1900, s. 2, sub-s. 1 (a), a name assumed by a money-lender for the first time for the purpose of registration cannot be described as his "usual trade name."

A money-lender who under different names carries on one business as an individual and another as a member of a partnership firm carries on business "in more than one name" within the meaning of s. 2, sub-s. 1 (b), and incurs the penalty imposed by s. 2, sub-s. 2, of the Act.



**MONEY-LENDERS**—*continued.*

The provision in s. 2, sub-s. 1 (c), strikes at a money-lender who is actually registered by the registration authorities and contracts otherwise than in his registered name, and not at a money-lender who being so registered contracts in that name.

Decision of the Court of Appeal, [1910] 1 K. B. 868, affirmed on the first two points (Lord Mersey dissenting as to the first point). Decision reversed on the third point. **WHITEMAN v. SADLER** - - - - **H. L. (E.) 514**

**MUNICIPAL CORPORATION.**

*See under CORPORATION.*

**NEGLIGENCE**—Action for damages for death of appellants' son—Negligence by respondents—Misdirection as to contributory negligence by deceased—Practice - **606**  
*See PRIVY COUNCIL APPEALS. 3.*

— Master and servant—Burden of proof—Statutory duty—Coal Mines Regulation Acts - - - - **74**  
*See EMPLOYER AND WORKMAN. 8.*

— Master and servant—Common employment—Negligence of fellow servants - **77**  
*See EMPLOYER AND WORKMAN. 9.*

— Shipping—Collision—Negligence of defendants' servant causing original damage—Liability for consequential damage  
*See SHIPPING. 3. 400*

— Shipping—Damage to cargo—Bill of lading—Charterparty—Negligence clause **450**  
*See SHIPPING. 4.*

**NEW SOUTH WALES**—Laws of.

*See under PRIVY COUNCIL APPEALS.*

**NEW TRIAL**—Jurisdiction of judge to grant  
*See COUNTY COURT. 373*

**NEWFOUNDLAND**—Laws of.

*See under PRIVY COUNCIL APPEALS.*

**NEWSPAPER**—Libel in—Publication—Intention to defame plaintiff - - - **20**  
*See DEFAMATION.*

**NEW ZEALAND**—Laws of.

*See under PRIVY COUNCIL APPEALS.*

**NONSUIT**—False imprisonment, Action for—Contract as to entry on and exit from wharf—Unreasonable conduct of plaintiff - - - - **295**  
*See PRIVY COUNCIL APPEALS. 1.*

**"OFFICER"**—Civil Service—Superannuation allowance—Construction - - **476**  
*See PRIVY COUNCIL APPEALS. 16.*

**ONTARIO**—Laws of - - - - **312**  
*See PRIVY COUNCIL APPEALS. 5.*

**PARLIAMENT**—Trade union—Objects of union—Rules—Parliamentary representation—Ultra vires—Alteration of rules **87**  
*See TRADE UNION.*

**PARTNERSHIP**—Purchase by survivor of share of deceased partner, Provision for—Surviving partner sole executor of deceased—Valuation - - - **465**  
*See PRIVY COUNCIL APPEALS. 19.*

**PILOTAGE DUES**—Shipping—Appeal from Canada - - - - **208**  
*See PRIVY COUNCIL APPEALS. 9.*

**PLAN**—Vendor and purchaser—Contract—Sale of estate by general name—Use of plan—Scottish law - - - **537**  
*See VENDOR AND PURCHASER.*

**POLICY**—Fire insurance.

*See under INSURANCE (FIRE).*

**POLLUTION**—Natural stream—Rivers Pollution Prevention Act, 1876 - - - **286**  
*See STREAM.*

**POOR RATE.**

*See under RATES.*

**PRACTICE**—*Discovery—Production of Documents between Member of Trade Union and Union Authorities with a View to Assistance in Legal Proceedings—Privilege between Solicitor and Client.*

A member of a trade union who had been dismissed by his employers furnished the union authorities, as required by the rules, with information in writing to enable the authorities to decide whether he was entitled to bring an action for wrongful dismissal at the expense of the union and with the assistance of their solicitor. The information comprised the evidence available in support of the action and the names of the witnesses. The union authorities sanctioned an action brought by the member, with their solicitor acting as solicitor for the plaintiff. Upon a summons for discovery taken out by the defendants:—  
*Held*, that the letters containing the information did not fall within the established rule as to the privilege between solicitor and client and must be produced.

*Anderson v. Bank of British Columbia, (1876) 2 Ch. D. 644, approved. JONES v. GREAT CENTRAL RAILWAY COMPANY - H. L. (E.) 4*

2. — *Discovery of Documents—Further Affidavit of Documents—Relevancy of Documents—Discretion—Rules of the Supreme Court, Order XXXI., r. 12.*

This House affirmed a decision of the majority of the Court of Appeal which affirmed the decision of Jelf J., who affirmed the decision of the Master that the plaintiff must make a further affidavit of documents—there being no principle of law in dispute and the whole question being one of discretion upon the facts.

Decision of the Court of Appeal, [1910] 1 K. B. 904, affirmed. **KENT COAL CONCESSIONS, LIMITED v. DUGUID - H. L. (E.) 452**

— County court.

*See under COUNTY COURT.*

— Retrial, Appellant's claim for, as a matter of right dismissed—Appeal from the Isle of Man - - - **197**  
*See PRIVY COUNCIL APPEALS. 14.*



**PRESCRIPTION**—Dignity—Jurisdiction—Non-alienability of office of Standard Bearer of Scotland—Sale of office - - 342  
See SCOTTISH LAW. 2.

**PRESCRIPTIVE USE**—Highway—Right for foot passengers—Accumulated use attributable to two roads—Substituted roads  
See HIGHWAY. 169

**PRINCIPAL AND AGENT**—Bankers, Liability of—Compradore's limited authority as their agent—Appeal from Hong Kong 174  
See PRIVY COUNCIL APPEALS. 13.

— Commission on sale of mining property—Sale completed on terms disapproved by agent  
See PRIVY COUNCIL APPEALS. 8. 614

**PRIVILEGE**—Discovery—Production of documents between member of trade union and union authorities—Privilege between solicitor and client - 4  
See PRACTICE. 1.

**PRIVY COUNCIL APPEALS—AUSTRALIA**—*False Imprisonment, Action for—Contract as to Entry on and Exit from Wharf—Toll—Unreasonable Conduct of Plaintiff—Nonsuit.*

In an action for damages for assault and false imprisonment it appeared that the plaintiff had contracted with the defendants to enter their wharf and stay there till the boat should start and then be taken by the boat to the other side. No breach of the defendants' undertaking was alleged, but the plaintiff after entry changed his mind and desired to effect an exit from their wharf without payment of the prescribed toll for exit, and was for a time forcibly prevented:—

*Held*, that he ought to have been nonsuited. The toll imposed was reasonable and the defendants were entitled to resist a forcible evasion of it. **ROBINSON v. BALMAIN NEW FERRY COMPANY** - - - P. C. 295

— New South Wales.

See Nos. 16—20, below.

**2. — BRITISH COLUMBIA**—*Company—Forfeiture of Shares—Alleged Irregularities in Call and Forfeiture—British Columbia Companies Acts, 1890, 1892.*

In an action by the appellants, being husband and wife, for a declaration that 240 shares in the respondent company standing in the name of the wife but of which she had executed a transfer to the husband (on the back of the certificate) had not been validly forfeited by the company, and that the husband was owner thereof and entitled to be registered as such, it appeared that the husband was a director of the company, a party to the resolution of the board making calls on the said shares and to the subsequent resolution declaring them to be delinquent and forfeited, and that notice dated May 22, 1895, of the call of that date and of the liability to forfeiture if unpaid was mailed by the secretary to the wife's address in Vancouver, being the address given by her husband in all proceedings connected with the

**PRIVY COUNCIL APPEALS—continued.**

company from 1891 onwards (no address being registered or given on the certificate):—

*Held*, that the plaintiffs had by their conduct disentitled themselves to the relief prayed for; that the notice fulfilled all the requirements of the Canadian Companies Act, 1890, s. 35, and the 9th and 10th by-laws of November 5, 1891; and that any objections to the absence of due formalities in the service on the husband of acts to which he was a party, and to the illegality of the allotment, calls, and forfeiture of the shares due to technical irregularities in the original appointment of the husband and others as directors, must be disallowed. **JONES v. NORTH VANCOUVER LAND AND IMPROVEMENT COMPANY, LIMITED LIABILITY** - - P. C. 317

**3. — Practice—Misdirection—Action for Damages for Death of Appellants' Son—Negligence by Respondents—Misdirection as to Contributory Negligence by Deceased—Practice—Judge's Charge not excepted to at the Trial or in First Appeal—Laws of British Columbia.**

In an action for damages for the death of appellants' son while acting as engineer of the respondents' lumber train the respondents were charged with negligence in respect of the train having been equipped with defective brakes and an incompetent brakeman, while the deceased was charged with contributory negligence in jumping from the train.

The jury found for the appellants, but a new trial was ordered by the Supreme Court. One judge was dissatisfied with the verdict on the ground of misdirection in regard to contributory negligence, and another judge held, contrary to both his colleagues, that the damages were excessive:—

*Held*, that the order must be reversed. It was too late for the respondents to rely on misdirection which they had not excepted to at the trial or in the notice of appeal or in oral argument before the Supreme Court. There were no sufficient grounds for a new trial on the head of excessive damages. **WHITE v. VICTORIA LUMBER AND MANUFACTURING COMPANY** P. C. 606

**4. — CANADA—Arbitration—Award as to Accounts of Common School Lands Fund—Can. Cons. Stat., 1859, c. 26—Arbitration under Canada Act, 54 & 55 Vict. c. 6, Ontario Act, 54 Vict. c. 2, Quebec Act, 54 Vict. c. 4—Jurisdiction of Arbitrators—Submission as to Accounts and Destination of Moneys received.**

By s. 9 of the award dated September 3, 1870, made in pursuance of the British North America Act, 1867, s. 142, it was directed that all moneys received by the Province of Ontario since June 30, 1867, from the school lands set apart by Canadian statutes (consolidated by Can. Cons. Stat. 1859, c. 26) and called the common school fund, should be paid to the Dominion, and that the income derived therefrom should be paid to the Provinces of Ontario and Quebec in the proportions specified in s. 5 of that statute.

On April 10, 1893, the three Governments of the Dominion, Ontario, and Quebec entered under statutory authority into an agreement of

**PRIVY COUNCIL APPEALS—continued.**

submission as to matters in difference in the settlement of accounts between them under the award of 1870, and for the ascertainment and distribution of the said school fund. Thereunder Quebec claimed that certain moneys, which it was admitted had not been actually received by Ontario, had been constructively received, since they were deductions which Ontario was not authorized to make except at her own expense, and should be the subject of distribution between them :—

*Held*, that the Supreme Court was right in affirming an award to the effect that the arbitrators had no jurisdiction. Moneys actually received by Ontario were alone the subject of the submission, the terms of which could not be extended so as to force a contribution from a larger constructive receipt.

*Attorney-General for Ontario v. Attorney-General for Quebec*, [1903] A. C. 39, followed.  
**ATTORNEY-GENERAL FOR QUEBEC v. ATTORNEY-GENERAL FOR ONTARIO - P. C. 627**

**5. — Canal—Canadian Canal Regulations of May 1, 1895, s. 19 (d)—Construction—Priority of Passage into Lachine Canal—Duty of Vessel lying by.**

The appellant vessel, a passenger steamer entitled to priority of passage under the Canadian Canal Regulations of May 1, 1895, was clearly to blame for a collision with the respondent's vessel which occurred at the entrance of the Lachine Canal in the harbour of Montreal :—

*Held*, that the respondent's vessel was not also to blame. It was not her duty under s. 19 (d) to move to some point not less than 300 feet from the entrance to the lock, for she was the only vessel about to enter, and even if she were waiting her turn the local conditions did not require her to lie by at that distance so long as there was accommodation at the wing walls where it was the practice to lie by.  
**RICHELIEU AND ONTARIO NAVIGATION COMPANY v. TAYLOR, THE "HAVANA" - P. C. 170**

**6. — Insurance (Fire) Policy—Protection from Liability while Gasoline is stored or kept in the Building insured—Construction—"Stored or kept."**

In an action upon a fire insurance policy the company relied upon a statutory condition protecting from liability "for loss or damage occurring while gasoline is stored or kept in the building insured." It appeared that the fire was caused by a small quantity of gasoline in a stove which was being used for cooking purposes, no other gasoline being in the building :—

*Held* that, whatever the precise signification of the words "stored or kept," there was no infringement of the condition having regard to the ordinary meaning of the words used.  
**THOMPSON v. EQUITY FIRE INSURANCE COMPANY - P. C. 592**

**7. — Insurance (Marine)—Civil Code of Lower Canada, art. 2522—Insurance against total Loss of Cargo "by total loss of vessel"—Construction—Total Loss of Thing insured.**

By a policy of marine insurance a cargo of  
**A. C. 1910.**

**PRIVY COUNCIL APPEALS—continued.**

cement was insured against a total loss "by total loss of the vessel." In an action thereon the jury found that barge and cargo had been practically if not completely submerged, that there had been an actual total loss of the cargo, caused by the wreckage of the barge, which, however, was not found in so many words to have been a total loss, and judgment was entered for \$2700 damages :—

*Held*, that the findings were amply sustained by the evidence and were to the effect that the loss of the cement insured had occurred in the manner contemplated by the policy; and that the order of the Supreme Court for a new trial directed to the issue whether the barge was a constructive total loss within the meaning of art. 2522, C. C., must be reversed.  
**MONTREAL LIGHT, HEAT, AND POWER COMPANY v. SEDGWICK - P. C. 598**

**8. — Principal and Agent—Commission on Sale of Mining Property—Sale completed on Terms disapproved by Agent—Agent the efficient Cause of the Sale effected.**

In an action by the appellant to recover an agreed commission on the proceeds of a sale of mining property by the respondent company the latter contended that he was not the efficient cause of the particular sale effected :—

*Held*, that as the appellant had brought the company into relation with the actual purchaser he was entitled to recover although the company had sold behind his back on terms which he had advised them not to accept.  
**BURCHELL v. GOWRIE AND BLOCKHOUSE COLLIERIES, LIMITED - P. C. 614**

**9. — Shipping — Pilotage Dues — Revised Statutes of Canada, 1886, c. 80, ss. 2 (b), 58 and 59—Construction.**

The respondents' vessels (about 440 tons each), built for the purpose of carrying coal, and carrying sails so as to be able to run before the wind, but not so as to be safely navigated in the ordinary way as sailing vessels, were towed by a steam tug in and out of the port of St. John.

In an action by the respondents to recover pilotage dues paid under the Pilotage Act (Revised Statutes of Canada, 1886, c. 80), ss. 58 and 59 :—

*Held*, that s. 58 applied to the said vessels as ships which navigate within the district of St. John, i.e., perform voyages into or out of the port of St. John; ships being defined by s. 2 (b) as including "every description of vessel used in navigation not propelled by oars," and s. 58 not indicating that in the pilotage waters a ship must at the time possess independent practical power of moving herself.

*Held*, also, that they were not exempted under s. 59 (c), since they were not ships propelled wholly or in part by steam, the word "propelled" not including traction within its scope.

**ST. JOHN PILOT COMMISSIONERS AND ATTORNEY-GENERAL FOR THE DOMINION OF CANADA v. CUMBERLAND RAILWAY AND COAL COMPANY - P. C. 208**



**PRIVY COUNCIL APPEALS—continued.**

10. — *Streets—Railway—New Lines—Ontario Act (1908) 8 Edw. 7, c. 112, s. 1—Construction and Effect.*

An Order in Council in pursuance of the judgment of their Lordships ([1907] A. C. 315) ordered that subject to certain conditions contained in their agreement it was for the respondents and not the appellants to determine what new lines should be laid down on streets within the city of Toronto.

Thereafter an order was made by the Ontario Railway and Municipal Board that the respondents construct between ten and fifteen additional miles of single track, and the company selected certain streets for that purpose. Subsequently the Court of Appeal for Ontario affirmed a decision of the said Board that the company had the right to select :—

*Held*, that the judgment in [1907] A. C. 315 was perfectly clear and that the Order in Council thereon was unaffected by Ontario Act 8 Edw. 7, c. 112, s. 1. **TORONTO CORPORATION v. TORONTO RAILWAY COMPANY - P. C. 312**

11. — *Treaty of October 3, 1873, extinguishing the Indian Interest in Lands—Payments by the Dominion under the Treaty—Suit by the Dominion against the Province of Ontario for Contribution as respects Lands within the Province—Law of Canada.*

By a treaty dated October 3, 1873, the Dominion Government, acting in the interests of the Dominion as a whole, secured to the Salteaux tribe of the Ojibeway Indians certain payments and other rights, at the same time extinguishing by consent their interest over a large tract of land about 50,000 square miles in extent, the greater part of which was subsequently ascertained to lie within the boundaries of the Province of Ontario. It having been decided that the release of the Indian interest effected by the treaty enured to the benefit of Ontario, the Dominion Government sued in the Exchequer Court for a declaration that it was entitled to recover from and be paid by the Province of Ontario a proper proportion of annuities and other moneys paid and payable under the treaty :—

*Held*, affirming the judgment of the Supreme Court, that, having regard to the jurisdiction conferred upon the Exchequer Court, the action must be dismissed as unsustainable on any principle of law. In making the treaty, although it resulted in direct advantage to the Province, the Dominion Government did not act as agent or trustee for the Province or with its consent, or for the benefit of the lands, but with a view to great national interest—that is, for distinct and important interests of their own—in pursuance of powers derived from the British North America Act, 1867.

*St. Catherine's Milling and Lumber Co. v. The Queen*, (1888) 14 App. Cas. 46, considered. **DOMINION OF CANADA v. PROVINCE OF ONTARIO - P. C. 637**

12. — **CHINA AND COREA—Shanghai—Shipping—Collision Regulations, art. 29—Signal**

**PRIVY COUNCIL APPEALS—continued.**

*as to Alteration of Course—No Duty to stop if Signal unanswered.*

Where the appellants' steamship came into collision with the respondents' lighter in a narrow channel under circumstances which rendered the respondents' tug clearly to blame :—

*Held*, that the judge was in error in holding the appellants' steamship also to blame because she did not stop her engines on the tug's failure to answer her signal to the effect that she had altered her course to the starboard. The tug seemed to be acting in accordance with the rule of the road, and the captain of the appellants' steamship in proceeding on his course cautiously at half speed did not fail in his duty in any respect. **CHINA NAVIGATION COMPANY, LIMITED v. ASIATIC PETROLEUM COMPANY, LIMITED, AND THE TAKU TUG AND LIGHTERAGE COMPANY, LIMITED. THE "TIENTSIN" P. C. 204**

13. — **HONG KONG—Bankers, Liability of—Compradore's limited Authority as their Agent—Action against Bankers to recover Moneys improperly received by Compradore.**

In an action by the respondent to recover from the appellant bank moneys paid to their compradore or Chinese agent at their Hong Kong branch for the purpose of a telegraphic transfer to the plaintiff's nominee at Shanghai it appeared that the compradore, to the knowledge of the plaintiff, had no authority without the express approval of the bank manager to receive the money or to fix the rate of exchange or other terms on which the transfer was to be effected :—

*Held*, that the bank was not liable for the compradore's misappropriation of the said moneys. His authority was limited to arranging the details of the proposed transaction and did not extend to receiving money on account of the bank until a binding contract had been made with the bank manager. There had been no holding out through any negligent or improper act by the bank of the compradore as apparently invested with an authority greater than the limited authority which the plaintiff knew him to possess. **RUSO-CHINESE BANK v. LI YAU SAM - P. C. 174**

14. — **ISLE OF MAN—Isle of Man Appellate Jurisdiction Act, 1867, ss. 3, 5—Construction—Appellant's Claim for Retrial as a Matter of Right dismissed—Verdict such as might reasonably be found.**

The Isle of Man Appellate Jurisdiction Act, 1867, provides a new mode of procedure with respect to traverses or appeals from verdicts of common law juries which had been abolished by an Act in 1866, re-enacting the old procedure only up to the point of entering the traverse, but no further. Sect. 3 of the Act of 1867 according to its true construction empowers the Court to review proceedings at a trial with respect to questions both of law and fact (except as to the admission and rejection of evidence), to determine all questions of law, and upon questions of fact or damages, subject to certain limitations in its first proviso, to order a new trial or to order judgment to be entered for

**PRIVY COUNCIL APPEALS—continued.**

either party. Sect. 5 of the said Act forbids the consideration of any questions as to any determination, ruling, or direction of the judge at the trial in matter of law unless the points or questions objected or excepted to be stated in the form of a case in writing agreed to or settled by the judge and filed at least three days before the hearing of the traverse.

Where a jury of six found against the appellant on his suit for damages to his land caused by the defendant's excavations on his land, and the appellant appealed from this finding without complying with s. 5, demanding a retrial of his claim before a jury of twelve on the testimony given in the Court below without recalling the witnesses or admitting further evidence, or in the alternative for a new trial on the ground that the verdict was against the weight of evidence:—

*Held*, that no question of law was open to the appellant, that the claim for retrial as a matter of right could not be allowed, and that there was evidence on which the jury might reasonably find that the damage was caused by subsidence due to the defendant's drainage of his own land, and not by the defendant's withdrawal of lateral support. *GILL v. WESTLAKE* P. C. 197

**15. — Specific Performance—Agreement to purchase Land—Manx Local Government Act, 1886, s. 286.**

Specific performance of a contract by the respondent commissioners to purchase the land in suit from the appellant decreed; their contentions—(1.) that one of their number was through his father "indirectly concerned" in the purchase within the meaning of Manx Local Government Act, 1886, s. 286, in a manner which conflicted with his duty; (2.) that the appellant had intimated his intention not to seek it—being overruled as not being established by the evidence. *LAUGHTON v. COMMISSIONERS OF PORT ERIN* - - - P. C. 565

**16. — NEW SOUTH WALES—Civil Service Act, 1884, ss. 2, 48—Public Service Superannuation Act, 1899—Superannuation Allowance—Construction—"Officer."**

*Held*, that according to the true construction of the New South Wales Civil Service Act, 1844, the respondent, who had held office from September 24, 1868, to December 31, 1869, as temporary draftsman, was during that period an officer in the Civil Service. He held during that period a permanent salaried office, and was therefore within the term "officer" as defined in s. 2, and not within its exception as a "person employed temporarily."

*Held*, further, that under s. 48 read in connection with the Public Service Superannuation Act, 1899, he was entitled to reckon the above period as additional service for the purpose of computing his superannuation allowance. *WILLIAMS v. MACHARG* - - - P. C. 476

**17. — Crown Lands—Contract of Sale of Conditional Purchases—Subject to the Provisions of Local Laws and Regulations—New South**

**PRIVY COUNCIL APPEALS—continued.**

*Wales Crown Lands Alienation Act, 1861, ss. 13 and 14—Construction.*

In an action by a vendor to recover a forfeitable deposit from the purchaser (and stakeholders) on the purchaser's failure to complete, the latter pleaded that as regards two portions of the land sold the vendor did not disclose a title as against the Crown to mine thereon for minerals other than gold:—

*Held*, that he was not bound to do so and was entitled to a decree. The contract specified that the said portions were sold subject to reservations mentioned in the schedule and to the local laws and regulations affecting the same. Gold was reserved to the Crown as mentioned in the schedule; all minerals were reserved by force of ss. 13 and 14 of New South Wales Crown Lands Alienation Act, 1861; and on the true construction of the contract there was no express or implied obligation on the vendor to shew that they had been acquired under s. 13 rather than s. 14 so as to be convertible into mining lands on terms prescribed by the Legislature. *BARTON v. LEMPRIERE* - P. C. 330

**18. — Crown Lands—New South Wales Crown Lands Acts—Agreement by the Crown with Licensee of Land—Jurisdiction of Land Appeal Court.**

An agreement by the Government that in consideration of a licensee of land paying licence fees as demanded (which had been refused because of a dispute as to a new appraisalment) a notification to the effect that the licences had not been renewed owing to non-payment thereof should be revoked and that the licensee should quietly enjoy his holding is not ultra vires the Crown as being contrary to the New South Wales Crown Lands Acts; and on breach thereof by the Government an action will lie.

*Held*, also, that the Land Appeal Court had no jurisdiction to determine the status of such land and to hold that the said land was not held by the licensee under the said agreement, but was available for annual leases. *WILLIAMS v. O'KEEFE* - - - P. C. 186

**19. — Partnership—Provision for Purchase by Survivor of Share of Deceased Partner—Surviving Partner Sole Executor of Deceased—Valuation an Incident in the Purchase—Error in Valuation to be strictly proved after long Delay—Validity of Purchase—Law of Partnership.**

By a clause in articles of partnership executed in 1878 between two brothers it was provided that on the death of either the survivor should pay to the executors of the deceased the full share to which they should be entitled on the taking of a general account in writing of the partnership assets, "such stock and other assets as shall not consist of money to be valued either by mutual agreement or valuation in the usual way nothing being charged for goodwill."

One brother died in 1886, and the survivor as sole executor under his will effected the valuation as directed, paid for the share as surviving partner, and thenceforth carried on the business on his own account.

In an action brought in 1908 by the residuary



**PRIVY COUNCIL APPEALS—continued.**

legatees under the said will against the surviving partner in effect for an account on the footing that there had been no operative sale and purchase in 1886 by reason of the valuation then made not being in manner authorized by the clause, and that the business must be deemed to have been carried on for the benefit of both parties to the suit:—

*Held*, that on the true construction of the clause there was a binding contract of sale and purchase, and that the valuation was only an incident in carrying out the same. The evidence shewed that a substantially accurate method had been adopted, but even if error had been shewn either in the method or the results it could not destroy the contract, but would fall to be corrected by the Court on being clearly and conclusively proved. The price of goodwill must in any event be excluded from the valuation, and the appellants could not rely exclusively on the dual character of the defendant which had been imposed upon him by their own testator.

*Vyze v. Foster*, (1874) L. R. 7 H. L. 318, and *Dinham v. Bradford*, (1869) L. R. 5 Ch. 519, approved. **HORDERN v. HORDERN - P. C. 465**

**20. — Sunday Trading at Railway Refreshment Rooms—Actual or intending Passengers—New South Wales Police Offences Act, 1901, s. 61—Construction.**

The respondent, lessee of the refreshment rooms at a railway station at Sydney, traded on Sunday by selling cigarettes. Upon an information filed against him under s. 61 of the New South Wales Police Offences Act, 1901, it was contended that the Sunday trading clauses of that Act did not bind the Crown, that the Railway Commissioners were in the same position as the Crown, and that the respondent was acting in accordance with a lease granted by the Commissioners and was therefore protected:—

*Held* that, as the lease did not authorize the supply of refreshments to other than actual or intending passengers, the onus lay on the respondent to prove that the purchaser of the cigarettes in this case was an actual or intending passenger, and as he had failed to do so he ought to have been convicted.

*Quære* whether the Sunday trading clauses in the said Act are binding upon the Crown. **KELLY v. HART - - - - P. C. 192**

**21. — NEW ZEALAND — Gasworks — Municipal Corporations Act, 1886, ss. 369, 370—Hamilton Gas Works Act, 1895, s. 46—Construction—Expropriation—Value of Gasworks as a going concern.**

Under New Zealand Hamilton Gasworks Act, 1895 (59 Vict. No. 1), statutory power was granted to construct and maintain gasworks in the town of Hamilton and to supply the said town and its suburbs with gas. Sect. 46 provided that the Hamilton Corporation should be entitled at any time after the expiration of twelve years from the date of the Act coming into operation "to purchase the gasworks and plant at a price to be determined by arbitration":—

*Held* that, on the true construction of the

**PRIVY COUNCIL APPEALS—continued.**

section, the price to be paid for the said gasworks and plant should be the commercial value thereof as a going concern, and not merely their structural value.

The respondents were constituted by the Municipal Corporations Act, 1886 (50 Vict. No. 50), and if they had exercised their powers of acquisition under ss. 369 and 370 of that Act would have had to pay the full commercial value. Had the intention of the Act of 1895 been to introduce a more limited signification of the term "gasworks," the language used should have plainly excluded therefrom either monopoly, goodwill, or undertaking as such. **HAMILTON GAS COMPANY v. HAMILTON CORPORATION P. C. 300**

**22. — Lease—Suit by Lessee on a Covenant to renew the Lease—Specific Performance—No Relief against Performance of Condition Precedent—Relief against Forfeiture on Breach of Covenant—New Zealand Property Law Act, 1908, ss. 93 and 94.**

*Held*, that ss. 93 and 94 of the New Zealand Property Law Act, 1908, which provide for relief against forfeiture of a lease based on failure to perform a covenant, do not apply where the lessor is resisting specific performance of a covenant to renew conditional on the performance of its covenants. There is no provision therein which purports to grant relief against the performance of a condition precedent.

Where the evidence disclosed a persistent course of wilful neglect of his covenants by the lessee, *held*, overruling the Court below, that he could not enforce a covenant for an extended term expressed in the lease to be conditional on their performance. Even if there were jurisdiction to grant relief, the circumstances of the lessee's breach must be such as to found an equitable claim thereto. **GREVILLE v. PARKER P. C. 335**

**23. — NEWFOUNDLAND — Contract — Construction — Exclusive Right of Entry on Appellants' Land for specified Purposes.**

Where by mutual agreement between the appellant railway company and the respondent telegraph company the latter was exclusively entitled to erect and work lines on the property of the former for the purposes of its own business and bound to furnish for the use of the former a special wire for the purposes of the railway as it existed at the date of the contract:—

*Held*, reversing the judgment of the Court below, that the respondents' exclusive right for the purposes of its own business did not exclude the railway company from erecting and working telegraph lines on its own property for the purposes of its railway business. **REID-NEWFOUNDLAND COMPANY v. ANGLO-AMERICAN TELEGRAPH COMPANY - - - P. C. 560**

**24. — TRANSVAAL — Roman-Dutch Law — Mutual Will—Community of Property between Spouses—Community of Property not continued after Death—Boedelhouderschap—Liability of Surviving Spouse as Executor to Deceased—Institution of Survivor as Sole and Universal**

**PRIVY COUNCIL APPEALS**—*continued.*

*Heir — Construction — Children's Rights of Inheritance.*

According to Roman-Dutch law as it prevails in the Transvaal, in the case of a mutual will by spouses with community of property the dispositions of each spouse are treated as applicable to his or her half of the joint property.

*Dennysen v. Mostert*, (1872) L. R. 4 P. C. 236, followed.

Where the surviving spouse is under the terms of the mutual will executor and administrator of the estate of the deceased, charged with the duty of holding the separate estate as part of the joint estate until the majority or marriage of the children, *held*, that in the absence of express direction in the will the community of property known as *boedelhouderschap* is not continued between the children and surviving spouse. Accordingly the rights of those entitled to the estate of the deceased must be adjusted by the familiar rules of accounting applicable to executory estates, and any profits made by the executor out of transactions with the joint estate form part of the trust estate and must be distributed as such according to the terms of the will.

*Held*, further, that by the established practice in South Africa as well as by judicial interpretation the effect of thus instituting in such a mutual will the surviving spouse as sole and universal heir or heiress is that the survivor and children are to be treated as joint heirs, the survivor being entitled to possession during the children's minority in order to support and educate them, and thereafter to be entitled to his own half of the joint estate together with a share in the estate of the deceased equal to that of a child, paying over to the children their portions as ascertained on an honest valuation.

*Oosthuizen v. Moeko*, (1866) 1 Roscoe, 230, approved. NATAL BANK, LIMITED *v.* ROOD

P. C. 570

**PRODUCTION OF DOCUMENTS**—Discovery.

*See under PRACTICE.*

**PROOF**—Negligence—Burden of proof—Statutory duty—Coal Mines Regulation Acts

74

*See EMPLOYER AND WORKMAN.* 8.

**PROPERTY AND INCOME TAX.**

*See under REVENUE.*

**PUBLIC POLICY**—Trade union—Objects of union—Rules—Parliamentary representation—Ultra vires

87

*See TRADE UNION.*

**PUBLICATION**—Libel in newspaper—Intention to defame plaintiff

20

*See DEFAMATION.*

**PURCHASE**—Partnership—Provision for purchase by survivor of share of deceased partner—Surviving partner sole executor of deceased—Valuation—Validity of purchase

465

*See PRIVY COUNCIL APPEALS.* 19.

**PURCHASER**—Vendor and.

*See under VENDOR AND PURCHASER.*

**QUEBEC**—Laws of - - - - - 627

*See PRIVY COUNCIL APPEALS.* 4.

**RAILWAY**—Mines and "other Minerals"—China Clay—Railway Company—Compulsory Purchase of Surface—Right to Support—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 77, 78.

China clay lying adjacent to and within lands in Cornwall purchased by the appellant railway company was not part of the ordinary composition of the soil in the district, and its presence was rare and exceptional :—

*Held*, as a matter of fact upon the evidence, that the china clay was a mineral within the provisions of the Railways Clauses Consolidation Act, 1845, and excepted from the lands conveyed to the railway company.

Decisions of Eve J. and the Court of Appeal, [1909] 1 Ch. 218, affirmed. GREAT WESTERN RAILWAY COMPANY *v.* CARPALLA UNITED CHINA CLAY COMPANY, LIMITED H. L. (E.) 83

**2. — Mines of Coal, Ironstone, Slate, or other Minerals—Sandstone—Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33), ss. 70, 71—Railways Clauses Consolidation (England) Act, 1845 (8 & 9 Vict. c. 20), ss. 77, 78.**

By s. 70 of the Railways Clauses Consolidation (Scotland) Act, 1845 (which corresponds to s. 77 of the Railways Clauses Consolidation (England) Act, 1845), "The (railway) company shall not be entitled to any mines of coal, ironstone, slate or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby" :—

*Held* (reversing the decision of the Second Division of the Court of Session, Scotland, (1909) S. C. 277), that sandstone is not a mineral within the meaning of the section. NORTH BRITISH RAILWAY COMPANY *v.* BUDHILL COAL AND SANDSTONE COMPANY

H. L. (Sc.) 116

**— Streets—New lines—Laws of Ontario** 312

*See PRIVY COUNCIL APPEALS.* 10.

**RATES**—Burial Ground separated from Church—Churchyard—Liability to Poor Rate—Profit derived from Burial Ground—Exemption from Poor Rate—Premises "exclusively appropriated to public religious worship"—Poor Rate Exemption Act, 1833 (3 & 4 Will. 4, c. 30).

A person in whom was vested by statute the freehold of a burial ground in connection with the church received for his own use burial fees and similar charges :—

*Held*, that as the beneficial occupier of the burial ground he was liable to the poor rate, and

**RATES**—*continued.*

was not exempt by virtue of the Poor Rate Exemption Act, 1833.

Decision of the Court of Appeal, [1908] 1 K. B. 835, affirmed. **WINSTANLEY v. NORTH MANCHESTER OVERSEERS** - - - **H. L. (E.) 7**

— Greenock Harbour Acts—Judicial factor—Receiver—Power to increase rates **274**  
See **SCOTTISH LAW. 3.**

**RECEIVER**—Greenock Harbour Acts—Judicial factor—Power to increase rates - **274**  
See **SCOTTISH LAW. 3.**

**REGISTRATION**—Dentist—Unregistered person—Description - - - **377**  
See **DENTIST.**

— Money-lender  
See under **MONEY-LENDERS.**

**REVENUE**—*Estate Duty*—*Foreign Bonds payable to Bearer*—*Bonds physically situate in the United Kingdom*—*Marketable Securities*—*Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1; s. 2, sub-s. 2.*

Foreign bonds and certificates payable to bearer, passing by delivery, and marketable on the London Stock Exchange are, when physically situate in the United Kingdom at the death of the owner, liable to estate duty under the Finance Act, 1894, even though the deceased was a foreigner domiciled abroad.

Decision of the Court of Appeal, [1908] 1 K. B. 1022, affirmed. **WINANS v. ATTORNEY-GENERAL (No. 2)** - - - **H. L. (E.) 27**

**2.**—*Income Tax*—*Sale of Annuities*—*Assessment on Revenue from Invested Funds*—*Income Tax Act, 1842 (5 & 6 Vict. c. 35), Sched. D, s. 102*—*Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 40*—*Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 24, sub-s. 3*—*Costs where Crown Litigant.*

By the Customs and Inland Revenue Act, 1888, s. 24, sub-s. 3, upon payment of any interest of money or annuities charged with income tax under Sched. D and not payable or not wholly payable out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge.

The appellant company carried on the ordinary business of a life insurance company, including the granting of annuities. The co-partnership contract of the company provided that every policy of insurance or other obligation should contain a clause declaring that the capital, stock, and funds of the company should be the only fund answerable for any demand under such policy or other obligation. The company had a very large annual income from interest, dividends, and rents, from which income tax was deducted at the source. The income from interest, divi-

**REVENUE**—*continued.*

dends, and rents was amply sufficient to pay the annuities in full. The company also had an income from premiums, but if the income from interest, dividends, and rents had been deducted from the company's revenue the trading of the company would have resulted in a quinquennium deficit. No formal appropriation of the income from interest, dividends, and rents was made in the books, nor was any particular fund specially charged with the payment of the annuities. In paying their annuities the company deducted the amount of income tax due in respect thereof and retained the amount of the tax so deducted:—

*Held* (reversing the decision of the First Division of the Court of Session, (1909) S. C. 847), that the company were entitled to retain for their own benefit the whole of the income tax deducted from the annuities, for where annuities are charged upon a tax-bearing fund from which the tax has been deducted at its source and which is amply sufficient to pay them in full, although not set apart for that purpose, they cannot be held to be not "payable" or not wholly "payable out of profits or gains brought into charge" within the meaning of the Act.

*Held*, also, that the claim to the tax having failed, the Crown was liable for the costs in the Court below and in the House in the same manner as if the action had been between subjects. **EDINBURGH LIFE ASSURANCE COMPANY v. LORD ADVOCATE** - - - **H. L. (Sc.) 143**

**3.**—*Property and Income Tax*—*Return of Profits under Sched. D*—"Deliver statement as aforesaid"—*Neglect to deliver "a true and correct statement"*—*Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 52, 55.*

The respondent, being required by s. 52 of the Income Tax Act, 1842, to deliver "a true and correct statement in writing" of his gains and profits under Sched. D, delivered an incorrect statement, not fraudulently, but (as the jury found) negligently, that is to say, not to the best of his judgment and belief according to the rules:—

*Held*, that the penalty imposed by s. 55 of the same Act for neglecting "to deliver any statement as aforesaid" is not limited to a case of non-delivery, but is applicable also to the present case.

Decision of the Court of Appeal, [1909] 1 K. B. 694, reversed and decision of Lord Alverstone C.J. restored. **ATTORNEY-GENERAL v. TILL** - - - **H. L. (E.) 50**

**REVERSIONARY LEASE.**

See under **LEASE.**

**RIGHT OF ENTRY.**

See under **ENTRY.**

**RIVER**—Natural stream—Pollution—Rivers Pollution Prevention Act, 1876 - **286**  
See **STREAM.**

**ROAD.**

See under **HIGHWAY.**

**ROMAN-DUTCH LAW**—Mutual will—Community of property between spouses - **570**  
See **PRIVY COUNCIL APPEALS. 24.**



**RULES OF THE SUPREME COURT**—Order  
XXXI. (Discovery and Inspection), r. 12  
See PRACTICE. 2. 452

**SALE**—Vendor and purchaser.  
See under VENDOR AND PURCHASER.

**SANDSTONE**—Mines of coal, ironstone, slate,  
or other minerals - - - 116  
See RAILWAY. 2.

**SCOTTISH JUDGMENT**—Attachment of debts  
—Extension to England—Garnishee  
order nisi—Rights of trustee in bank-  
ruptcy - - - - - 508  
See ATTACHMENT.

**SCOTTISH LAW**—Arbitration—Lease—Outgoing  
Tenant—Sheep Stock Valuation—Agricultural  
Holdings (Scotland) Act, 1908 (8 Edw. 7, c. 64),  
s. 11, sub-s. 1—Farming Lease.

By s. 11, sub-s. 1, of the Agricultural Hold-  
ings (Scotland) Act, 1908, "All questions which  
under this Act, or under the lease, are referred to  
arbitration, shall, whether the matter to which  
the arbitration relates arose before or after the  
passing of this Act, be determined, notwith-  
standing any agreement under the lease or  
otherwise providing for a different method of  
arbitration, by a single arbiter in accordance  
with the provisions set out in the Second  
Schedule to this Act."

The appellant was tenant of a farm under a  
lease which contained the following clause:—  
The appellant binds himself at the expiry of his  
lease to "leave the sheep stock on the farm to  
the proprietors or incoming tenant according to  
the valuation of men mutually chosen with  
power to name an oversman":—

*Held* (affirming the decision of the First  
Division of the Court of Session, (1909) S. C.  
1254), that the valuation of the sheep stock  
was referred to "arbitration" in Scottish law  
and consequently fell within s. 11, sub-s. 1, of the  
Act of 1908, which section superseded the pro-  
visions of the lease. STEWART v. WILLIAM-  
SON - - - - - H. L. (Sc.) 455

2. — *Dignity—Jurisdiction—Non-alien-  
ability of Office of Standard Bearer of Scotland*  
—Sale of Offices—Prescription—Scots Act, 1455,  
c. 44.

*Held*, that all heritable offices are not  
adjudicable, and that the office or dignity of  
Hereditary Royal Standard Bearer of Scotland  
being vested in the appellant's family by right  
of blood could not be carried by any decree of  
the Court of Session nor adjudged nor be lost to  
the appellant's family except under circum-  
stances which had not occurred.

*Held*, therefore, that the respondent the Earl  
of Lauderdale had no right or title to the office  
or dignity of Hereditary Royal Standard Bearer  
of Scotland.

Decision of the First Division of the Court  
of Session, Scotland, (1905) 7 F. 1045; (1908)  
S. C. 1237, reversed.

*Cockburn of Langton's Case*, (1747) Mor.  
Dict. 150; (1755) H. L. 1 Pat. App. 603, com-

**SCOTTISH LAW**—continued.

mented on. WEDDERBURN v. EARL OF  
LAUDERDALE - - - - - H. L. (Sc.) 342

3. — *Judicial Factor—Receiver—Power to  
increase Rates—Greenock Harbour Act, 1880*  
(43 & 44 Vict. c. clxx.), s. 70—*Greenock Harbour*  
*Act, 1888* (51 & 52 Vict. c. cxviii.), ss. 21, 22.

By the Greenock Harbour Act, 1880 (43 & 44  
Vict. c. clxx.), s. 70, "Every application for a  
judicial factor under the provisions of this Act  
shall be made to the sheriff, and on any such  
application the sheriff may by order in writing,  
after hearing the parties, appoint some person to  
receive the whole or a competent part of the  
rates and duties and other revenues of the trust,  
until all the arrears of interest or of principal,  
as the case may be, . . . be fully paid."

The appellant, as judicial factor of the  
Greenock Harbour Trust, claimed to be entitled  
to demand for sugar shipped into or unshipped  
from vessels (foreign) at the port and harbour of  
Greenock the rate of 1s. 3d. per ton, being the  
maximum rate authorized by the Greenock  
Harbour Act, 1880. This rate was fixed by the  
appellant in opposition to the wishes of the  
respondents, the Greenock Harbour trustees,  
who insisted that the rate should be only 10d.  
per ton, the rate fixed by the respondents prior  
to the appointment of the appellant:—

*Held* (affirming the decision of the First  
Division of the Court of Session, Scotland,  
(1908) S. C. 944), that the judicial factor was  
merely a receiver of the tolls and income of the  
undertaking and not its manager, and that he  
had no implied authority to increase or destroy  
the different sources of revenue. CARMICHAEL  
v. GREENOCK HARBOUR TRUSTEES

H. L. (Sc.) 274

4. — *Master and Servant—Burgh Surveyor*  
—Extra Work—Delay.

The pursuer was appointed in 1868 surveyor  
of police by the police commissioners of Dundee  
at a salary of 400*l.* (subsequently raised to  
500*l.*), and continued in that office and (after  
1894) as burgh surveyor to the town council  
until 1906. By the terms of his appointment it  
was stipulated that he should devote all his  
services to the business of the commissioners.  
During the thirty-eight years of his employment  
he did work for the commissioners in excess of  
what was contemplated at the time of his  
appointment, and particularly in regard to the  
promotion of various Bills in Parliament. On  
three occasions they paid him an honorarium,  
but otherwise he received no additional  
remuneration for his work. In 1906 he claimed  
and brought an action against the commissioners  
for 15,000*l.* in respect of extra work:—

*Held* (affirming the decision of the Second  
Division of the Court of Session, Scotland,  
(1909) S. C. 971), that there was no evidence on  
which they could be held to be liable. MACKISON  
v. DUNDEE MAGISTRATES - H. L. (Sc.) 285

— *Highway—Right for foot passengers—  
Prescriptive use—Accumulated use  
attributable to two roads—Substituted  
roads - - - - - 169*  
See HIGHWAY.



**SCOTTISH LAW—continued.**

— Income tax—Sale of annuities—Assessment on revenue from invested funds - - - - - 143  
See REVENUE. 2.

— Mines of coal, ironstone, slate, or other minerals—Sandstone - - - - 116  
See RAILWAY. 2.

— Ship—Collision—Firth of Forth a "narrow channel"—Damages for loss of life—Ship in fault - - - - - 165  
See SHIPPING. 2.

— Shipping—Demurrage—Charterparty—Bill of lading not put in evidence—Hypothetical case - - - - 293  
See SHIPPING. 1.

— Stream—Natural stream—Pollution - 286  
See STREAM.

— Vendor and purchaser—Contract—Sale of estate by general name—Use of plan - - - - - 537  
See VENDOR AND PURCHASER.

**SEAMAN**—"Seaman"—Employers' liability—Compensation - - - - - 220  
See EMPLOYER AND WORKMAN. 5.

— Workmen's compensation—Ladder - 498  
See EMPLOYER AND WORKMAN. 6.

— Workmen's compensation—Unexplained drowning—Evidence - - - - 486  
See EMPLOYER AND WORKMAN. 4.

**SERVANT**—Master and.  
See under EMPLOYER AND WORKMAN.

**SERVICE**—Contract of.  
See under CONTRACT OF SERVICE.

**SHANGHAI**—Laws of - - - - - 204  
See PRIVY COUNCIL APPEALS. 12.

**SHARES**—Company.  
See under COMPANY.

**SHEEP**—Agricultural Holdings (Scotland) Act, 1908—Arbitration—Farming lease—Sheep stock valuation - - - - 455  
See SCOTTISH LAW. 1.

**SHIPPING**—Charterparty—Demurrage—Bill of Lading not put in Evidence—Hypothetical Case.

Action dismissed when it appeared to the House to have been brought to try a hypothetical case. No costs.

Appeal from a judgment of the Second Division of the Court of Session, Scotland, (1909) S. C. 1414. **GLASGOW NAVIGATION COMPANY v. IRON ORE COMPANY H. L. (Sc.) 293**

2. — Collision—Damages for Loss of Life—Ship in fault—Regulations for Preventing Collisions at Sea, art. 25—Firth of Forth a "narrow Channel"—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 419.

The Firth of Forth from the Forth Bridge

**SHIPPING—continued.**

upwards is a "narrow channel" within art. 25 of the regulations for preventing collisions at sea.

Decision of the First Division of the Court of Session, Scotland, (1909) S. C. 561, affirmed. **SCREW COLLIER COMPANY v. WEBSTER OR KERR - - - - H. L. (Sc.) 165**

3. — Collision—Negligence of Defendants' Servant causing original Damage—Negligence of Plaintiffs' Servant causing subsequent Loss—Servant acting in Dual Capacity—Liability for Consequential Damage.

A watchman employed by the appellants to take charge of their trawler in dock agreed with the respondents' manager to take the respondents' trawler into the same dock. By pure negligence the watchman so navigated the respondents' trawler as to cause a collision with the appellants' trawler. Instead of examining the damage done to the appellants' trawler, as in duty bound, he entirely neglected his duty and consequently the appellants' trawler sank in the dock :—

Held, that though the respondents were liable for the damage caused by the collision they were not liable for the foundering of the appellants' vessel, it having been proved that the vessel need not have sunk if the watchman had examined the appellants' trawler immediately.

Decision of the Court of Appeal (*The "Egyptian,"* [1910] P. 38) affirmed. **GRANT v. OWNERS OF S.S. EGYPTIAN. THE "EGYPTIAN" H. L. (E.) 400**

4. — Damage to Cargo—Bill of Lading—Charterparty—Negligence Clause.

The decision of the Court of Appeal (*The "Draupner,"* [1909] P. 219) that the shipowners were liable for the damage to the cargo was reversed by this House without deciding any question of law, on the ground that the Court of Appeal drew a wrong inference from admitted facts. **OWNERS OF S.S. DRAUPNER v. OWNERS OF CARGO OF S.S. DRAUPNER. THE "DRAUPNER" - - - - H. L. (E.) 450**

— Canadian Canal Regulations, 1895—Priority of passage into Lachine Canal—Duty of vessel lying by - - - - 170  
See PRIVY COUNCIL APPEALS. 5.

— Pilotage dues—Appeal from Canada - 208  
See PRIVY COUNCIL APPEALS. 9.

— "Seaman"—Compensation—Employers liability - - - - - 220  
See EMPLOYER AND WORKMAN. 5.

— Signal as to alteration of course—No duty to stop if signal unanswered - 204  
See PRIVY COUNCIL APPEALS. 12.

— Workmen's compensation—Seaman—Ladder - - - - - 498  
See EMPLOYER AND WORKMAN. 6.

— Workmen's compensation—Seaman—Unexplained drowning - - - - 486  
See EMPLOYER AND WORKMAN. 4.

**SOLICITOR**—Discovery—Production of documents between member of trade union and union authorities—Privilege between solicitor and client - - 4  
See PRACTICE. 1.

**SPECIFIC PERFORMANCE**—Agreement to purchase land—Manx Local Government Act, 1886 - - - 565  
See PRIVY COUNCIL APPEALS. 15.

— New Zealand Property Law Act, 1908—Suit by lessee on a covenant to renew the lease - - - 335  
See PRIVY COUNCIL APPEALS. 22.

**STANDARD BEARER OF SCOTLAND**—Non-alienability of office of—Dignity—Jurisdiction—Sale of office - - 342  
See SCOTTISH LAW. 2.

# STATUTES:—

## I. IMPERIAL STATUTES.

1455.  
Scots Act, 1455, c. 44. - - - 342  
See SCOTTISH LAW. 2.

1833.  
3 & 4 Will. 4, c. 30—*Poor Rate Exemption* - - - 7  
See RATES.

1842.  
5 & 6 Vict. c. 35, ss. 52, 55—*Income Tax* 50  
See REVENUE. 3.  
— Sched. D, s. 102 - - 143  
See REVENUE. 2.

1845.  
8 & 9 Vict. c. 20, ss. 77, 78—*Railways Clauses Consolidation* - - 83, 116  
See RAILWAY. 1, 2.  
— c. 33, ss. 70, 71—*Railways Clauses Consolidation (Scotland)* - - 116  
See RAILWAY. 2.

1853.  
16 & 17 Vict. c. 34, s. 40—*Income Tax* 143  
See REVENUE. 2.

1857.  
20 & 21 Vict. c. 81, s. 24—*Burial* - 225  
See BURIAL.

1871.  
34 & 35 Vict. c. 31, s. 4, sub-s. 3 (a); ss. 13, 23—*Trade Union* - - 87  
See TRADE UNION.

1875.  
38 & 39 Vict. c. 90, s. 13—*Employers and Workmen* - - - 220  
See EMPLOYER AND WORKMAN. 5.

1876.  
39 & 40 Vict. c. 22, s. 16—*Trade Union Act Amendment* - - - 87  
See TRADE UNION.

## STATUTES—continued.

39 & 40 Vict. c. 75, ss. 3, 20—*Rivers Pollution Prevention* - - - 286  
See STREAM.

1878.  
41 & 42 Vict. c. 33, s. 3—*Dentists* - 377  
See DENTIST.

1880.  
43 & 44 Vict. c. 42, s. 8—*Employers' Liability* - - - 220  
See EMPLOYER AND WORKMAN. 5.

— c. clxx., s. 70—*Greenock Harbour* 274  
See SCOTTISH LAW. 3.

1883.  
46 & 47 Vict. c. 52, s. 117—*Bankruptcy* 508  
See ATTACHMENT.

1887.  
50 & 51 Vict. c. 58, s. 49, r. 12; s. 50—*Coal Mines Regulation* - - 74  
See EMPLOYER AND WORKMAN. 8.

1888.  
51 & 52 Vict. c. 8, s. 24, sub-s. 3—*Customs and Inland Revenue* - 143  
See REVENUE. 2.

— c. 43, s. 93—*County Courts* - - 373  
See COUNTY COURT.

— c. cxiii., ss. 21, 22—*Greenock Harbour* - - - 274  
See SCOTTISH LAW. 3.

1893.  
56 & 57 Vict. c. 31, s. 1—*Rivers Pollution Prevention* - - - 286  
See STREAM.

1894.  
57 & 58 Vict. c. 30, s. 1; s. 2, sub-s. 2—*Finance* - - - 27  
See REVENUE. 1.

— c. 60, s. 419—*Merchant Shipping* - 165  
See SHIPPING. 2.

— c. ccxiii., ss. 22, 182—*London Building* - - - 1  
See LONDON.

1896.  
59 & 60 Vict. c. 25, s. 68—*Friendly Societies* - - - 404  
See FRIENDLY SOCIETY.

— c. 43, s. 6—*Coal Mines Regulation* 74  
See EMPLOYER AND WORKMAN. 8.

1897.  
60 & 61 Vict. c. 37, s. 2—*Workmen's Compensation* - - - 409  
See EMPLOYER AND WORKMAN. 7.

1899.  
62 & 63 Vict. c. 14, ss. 4, 23—*London Government* - - - 225  
See BURIAL.

## STATUTES—continued.

1900.	
63 & 64 Vict. c. 51, s. 2— <i>Money-lenders</i>	514
See MONEY-LENDERS. 2.	
— s. 2, sub-s. 1 (b) - - -	422
See MONEY-LENDERS. 1.	
1904.	
4 Edw. 7, c. 23, s. 3, sub-s. 3; Sched. II.— <i>Licensing</i>	394
See LICENSING ACTS.	
1906.	
6 Edw. 7, c. 58, s. 1— <i>Workmen's Compensation</i>	486
See EMPLOYER AND WORKMAN. 2, 4.	
— s. 1, sub-s. 1 - - -	498
See EMPLOYER AND WORKMAN. 6.	
— s. 13; First Schedule (1.) (a)	229
See EMPLOYER AND WORKMAN. 1.	
— Sched. I. (16.) - - -	444
See EMPLOYER AND WORKMAN. 3.	
1908.	
8 Edw. 7, c. 64, s. 11, sub-s. 1— <i>Agricultural Holdings (Scotland)</i>	455
See SCOTTISH LAW. 1.	

## II. COLONIAL STATUTES.

*British Columbia, Statutes of:*

British Columbia Companies Acts, 1890, 1892 - - -	317
See PRIVY COUNCIL APPEALS. 2.	

*Canada, Statutes of:*

Can. Cons. Stat., 1859, c. 26 - - -	627
See PRIVY COUNCIL APPEALS. 4.	
Civil Code of Lower Canada, art. 2522 - - -	598
See PRIVY COUNCIL APPEALS. 7.	
Revised Statutes of Canada, 1886, c. 80, ss. 58, 59 - - -	208
See PRIVY COUNCIL APPEALS. 9.	
Ontario Act, 1891 (54 Vict. c. 2) - - -	627
See PRIVY COUNCIL APPEALS. 4.	
Quebec Act, 1891 (54 Vict. c. 4) - - -	627
See PRIVY COUNCIL APPEALS. 4.	
Canada Act, 1891 (54 & 55 Vict. c. 6) - - -	627
See PRIVY COUNCIL APPEALS. 4.	
Canadian Canal Regulations of May 1, 1895, s. 19 (d) - - -	170
See PRIVY COUNCIL APPEALS. 5.	
Ontario Act, 1908 (8 Edw. 7, c. 112), s. 1	312
See PRIVY COUNCIL APPEALS. 10.	

*Isle of Man, Statutes of:*

Isle of Man Appellate Jurisdiction Act, 1867, ss. 3, 5 - - -	197
See PRIVY COUNCIL APPEALS. 14.	
Manx Local Government Act, 1886, s. 286 - - -	565
See PRIVY COUNCIL APPEALS. 15.	

## STATUTES—continued.

*New South Wales, Statutes of:*

New South Wales Crown Lands Alienation Act, 1861, ss. 13, 14 - - -	330
See PRIVY COUNCIL APPEALS. 17.	
Civil Service Act, 1884, ss. 2, 48 - - -	476
See PRIVY COUNCIL APPEALS. 16.	
Public Service Superannuation Act, 1899 - - -	476
See PRIVY COUNCIL APPEALS. 16.	
New South Wales Police Offences Act, 1901, s. 61 - - -	192
See PRIVY COUNCIL APPEALS. 20.	

*New Zealand, Statutes of:*

Municipal Corporations Act, 1886 (50 Vict. No. 50), ss. 369, 370 - - -	300
See PRIVY COUNCIL APPEALS. 21.	
New Zealand Hamilton Gas Works Act, 1895 (59 Vict. No. 1), s. 46 - - -	300
See PRIVY COUNCIL APPEALS. 21.	
New Zealand Property Law Act, 1908, ss. 93, 94 - - -	335
See PRIVY COUNCIL APPEALS. 22.	

**STREAM**—*Natural Stream—Pollution—Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), ss. 3, 20—Act 1893 (56 & 57 Vict. c. 31), s. 1.*

The respondents applied for an order to restrain the appellants under the Rivers Pollution Prevention Act, 1876, "to abstain from causing to fall or flow or to be carried into" certain streams which flow through or by certain parishes in the county of Lanark and within the respondents' district "any solid or liquid sewage matter." The appellants alleged that the burns and streams in question were not "streams" within the meaning of the Act, in respect that at the date of the passing of the Act they were mainly used as sewers. There was a definite finding in fact that the appellants discharged all their sewage into the burns in question:—

*Held* (affirming the decision of the First Division of the Court of Session), that the burns in question were "streams" and not "watercourses mainly used as sewers" within the meaning of the Rivers Pollution Prevention Act, 1876.

Appeal from interlocutors of the First Division of the Court of Session, the last material one being dated June 4, 1909. Reported at an earlier stage, (1906) 8 F. 802. **AIRDRIE MAGISTRATES v. LANARK COUNTY COUNCIL. COATBRIDGE MAGISTRATES v. LANARK COUNTY COUNCIL** - - - **H. L. (Sc.) 286**

**STREET**—General line of buildings—Superintending architect's certificate—Appeal to tribunal of appeal - - - **1**  
See LONDON.

— Railway—New lines—Laws of Ontario - **312**  
See PRIVY COUNCIL APPEALS. 10.

**SUBSIDENCE**—Mines—Overlying and underlying seams of coal—Powers of working—Subsidence—Right to support—Evidence - - - - - **381**  
See MINES.

**SUBSTITUTED ROADS**—Right for foot passengers—Prescriptive use—Accumulated use attributable to two roads - **169**  
See HIGHWAY.

**SUNDAY**—Sunday trading at railway refreshment rooms—Actual or intending passengers - - - - - **192**  
See PRIVY COUNCIL APPEALS. 20.

**SUPERANNUATION**—Civil Service—Superannuation allowance—Construction—“Officer” - - - - - **476**  
See PRIVY COUNCIL APPEALS. 16.

**SUPPORT**—Right of—Mines—Overlying and underlying seams of coal—Powers of working—Subsidence—Evidence - **381**  
See MINES.

— Right to support—Railway company—Mines and “other minerals”—China clay - - - - - **83**  
See RAILWAY. 1.

**SURVEYOR**—Master and servant—Burgh surveyor—Extra work—Delay - **285**  
See SCOTTISH LAW. 4.

**TAXES**—Inland Revenue.  
See under REVENUE.

**TOLL**—False imprisonment, Action for—Contract as to entry on and exit from wharf—Unreasonable conduct of plaintiff—Nonsuit - - - - - **295**  
See PRIVY COUNCIL APPEALS. 1.

**TRADE MARK**—*Passing off*—“*Chartreuse*”—*French Law of Associations*—*Vesting of French Business under French Judgment*—*Effect of French Law upon Property in English Trade Marks*—*Rectification of Register*.

Where a foreign manufacture has acquired a reputation in England it is beyond the power of a foreign Court or foreign legislature to prevent the manufacturers from availing themselves in England of the benefit of that reputation or to extend or communicate the benefit to any rival or competitor in the English market.

Decision of the Court of Appeal, [1908] 2 Ch. 715, affirmed. *LECOUTURIER v. REY AND ANOTHER*. *LECOUTURIER v. REY AND OTHERS* **H. L. (E.) 262**

**TRADE UNION**—*Definition*—*Objects of Union*—*Rules*—*Parliamentary Representation*—*Ultra vires*—*Alteration of Rules*—*Public Policy*—*Trade Union Act, 1871* (34 & 35 Vict. c. 31), s. 4, sub-s. 3 (a); ss. 13, 23—*Trade Union Act Amendment Act, 1876* (39 & 40 Vict. c. 22), s. 16.

There is nothing in the Trade Union Acts from which it can reasonably be inferred that trade unions as defined by Parliament were

**TRADE UNION**—*continued*.

meant to have the power of collecting and administering funds for political purposes.

A rule which purports to confer on any trade union registered under the Act of 1871 a power to levy contributions from members for the purpose of securing parliamentary representation, whether it be an original rule of the union or a rule subsequently introduced by amendment, is ultra vires and illegal.

Decision of the Court of Appeal, [1909] 1 Ch. 163, affirmed on the above ground by the Ear of Halsbury and Lords Macnaghten and Atkinson; by Lord James of Hereford because one of the rules in question would bind a member of Parliament to answer the whip of the Labour party; and by Lord Shaw of Dunfermline on the constitutional ground that certain rules of the appellants were fundamentally illegal, being in violation of that sound public policy which is essential to the working of representative government. *AMALGAMATED SOCIETY OF RAILWAY SERVANTS v. OSBORNE* **H. L. (E.) 87**

— Discovery—Privilege between solicitor and client—Production of documents between member of trade union and union authorities - - - - - **4**  
See PRACTICE. 1.

**TRANSVAAL**—Laws of.  
See under PRIVY COUNCIL APPEALS.

**TREATY**—Canada, Law of—Treaty of October 3, 1873, extinguishing the Indian interest in lands - - - - - **637**  
See PRIVY COUNCIL APPEALS. 11.

**TRIAL**—Appellant's claim for retrial as a matter of right dismissed—Appeal from the Isle of Man - - - - - **197**  
See PRIVY COUNCIL APPEALS. 14.

— County court—New trial—Jurisdiction of judge to grant—Practice - - - **373**  
See COUNTY COURT.

**ULTRA VIRES**—Company—Dividends out of capital—Want of consideration - **439**  
See COMPANY.

— Friendly society—Dispute—Arbitration under rules—Order to pay costs—Jurisdiction - - - - - **404**  
See FRIENDLY SOCIETY.

— Trade union—Objects of union—Rules—Parliamentary representation—Alteration of rules - - - - - **87**  
See TRADE UNION.

**UNION**—Trade union.  
See under TRADE UNION.

**USER**—Highway—Right for foot passengers—Prescriptive use—Accumulated use attributable to two roads—Substituted roads - - - - - **169**  
See HIGHWAY.



**VALUATION**—Partnership—Provision for purchase by survivor of share of deceased partner—Surviving partner sole executor of deceased - - - - 465  
*See PRIVY COUNCIL APPEALS. 19.*

**VENDOR AND PURCHASER**—*Contract—Sale of Estate by General Name—Use of Plan—Scottish Law.*

Where an estate is sold as shewn upon a plan and there is no dispute as to the validity of the contract, the plan decides what is the extent of the estate sold; and this is so although the particulars given and taken as being particulars of what is comprised in the plan erroneously contained particulars which were not contained in the plan.

Such erroneous misstatements may afford the buyer good ground for a reduction of the contract, but in the absence of any action for this purpose he cannot found on the misrepresentation with the object of obtaining an estate larger than that delineated on the plan.

So *held*, reversing the decision of the Second Division of the Court of Session, Scotland, (1909) S. C. 1198. GORDON-CUMMING *v.* HOULDSWORTH  
**H. L. (Sc.) 537**

— New South Wales Crown Lands Alienation Act, 1861—Contract of sale of conditional purchases—Subject to the provisions of local laws and regulations 330  
*See PRIVY COUNCIL APPEALS. 17.*

**VENDOR AND PURCHASER**—*continued.*

— Specific performance—Agreement to purchase land—Manx Local Government Act, 1886 - - - - 565  
*See PRIVY COUNCIL APPEALS. 15.*

**WAY, RIGHT OF**—Highway—Right for foot passengers—Prescriptive use—Accumulated use attributable to two roads—Substituted roads - - - 169  
*See HIGHWAY.*

**WILL**—Roman-Dutch law—Mutual will—Community of property between spouses—Children's rights of inheritance 570  
*See PRIVY COUNCIL APPEALS. 24.*

**WORDS**—"Chartreuse" - - - - 262  
*See TRADE MARK.*

— "Minerals" - - - - 83, 116  
*See RAILWAY. 1, 2.*

— "Narrow channel" - - - - 165  
*See SHIPPING. 2.*

— "Officer" - - - - 476  
*See PRIVY COUNCIL APPEALS. 16.*

— "Seaman" - - - - 220  
*See EMPLOYER AND WORKMAN. 5.*

**WORKMAN**—Employer and.  
*See under EMPLOYER AND WORKMAN.*











